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“ENTRY” AS AN ISSUE IN IMMIGRATION LAW

Often the first issue a court or administrative body must address in determining the right of an alien to remain in the United States is whether the alien has made an “entry.” The term means much more than simply being physically present in the country and its implications are profound. Section 101(a)(13) of the Immigration and Nationality Act sets forth the statutory definition of “entry.” This Comment examines each of the elements of the statutory definition and surveys the various interpretations thereof by federal courts and the Board of Immigration Appeals.

THE SIGNIFICANCE OF “ENTRY”

One fundamental characteristic of sovereignty is that a nation may prescribe the terms and conditions by which an alien may enter that nation. An alien has no right to enter the United States unless Congress grants it to him; he has no constitutional rights regarding his application for entry. However, once the alien has made an “entry” into the United States, his status changes and he is afforded

1. [It is an] accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. . . . United States ex rel. Turner v. Williams, 194 U.S. 279, 290 (1904). See also United States v. Ju Toy, 198 U.S. 253, 261 (1905); Nishimura Eiki v. United States, 142 U.S. 651, 659 (1892).


constitutional protections accordingly.8

“Entry” into the United States also determines the applicability of numerous statutory provisions of the Immigration and Nationality Act (hereinafter referred to as “the INA” or “the Act”),6 most importantly, the provisions relating to exclusion and expulsion of aliens. One court recently summarized the statutory importance of an “entry” as follows:

[T]he immigration laws have long made a distinction between those aliens who have come to the United States seeking admission and those “in” the United States after an “entry,” irrespective of its legality. The Immigration and Nationality Act preserves the distinction. Those seeking admission are subjected to “exclusion proceedings” to determine whether they “shall be allowed to enter or shall be excluded and deported.” Aliens once they have made an “entry” are subject to “expulsion” if they fall within those categories of aliens who may be “deported” by the Attorney General. Proceedings for expulsion are commonly referred to as “deportation proceedings.”

Deportation, although not criminal punishment, can amount to banishment or exile for one who has been in the country long enough to establish a home, job, or family.8 Consequently, under the INA, aliens who have “entered” the United States have greater procedural and substantive rights than those who have not “entered.”

An entrant alien in expulsion proceedings is entitled to prior notice, the right to counsel, the right to present evidence, and other safeguards under section 242(a) of the Act.10 He is also entitled to certain bond redetermination,11 venue,12 and appeal process13 advan-

9. Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); Maldonado-Sandoval v. INS, 518 F.2d 278, 280 n.3 (9th Cir. 1975).
11. Section 242(a) of the Act authorizes the Attorney General to release an alien on bond pending deportation proceedings. 8 U.S.C. § 1252(a) (1982). Regulations promulgated under this section permit immigration judges to review the amount of the original bond and reduce it in appropriate cases. 8 C.F.R. § 1252.2(b) (1983).
12. A deportation proceeding is usually held near the alien’s residence within the United States, while exclusion proceedings are usually held at the port of entry. Landon v. Plasencia, 103 S. Ct. 321, 325 (1982) (citing 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.6c (1981)).
13. After exhausting his administrative remedies, an alien who is subject to depor-
tages. These rights are denied to a non-entrant alien under the more limited exclusion hearing procedures of sections 236(a) and (b) of the Act.14

A deportable alien also has several substantive rights which are denied to an excludable alien.16 He may be allowed to depart from the United States voluntarily;16 he may be allowed to designate the country to which he will be deported;17 and he may seek discretionary suspension of deportation18 or a stay of deportation.19

“Entry” is also important because it determines the basic applicability of the INA’s deportation provisions. Section 241(a) of the INA20 lists nineteen classes of deportable aliens. Membership in each class is determined either at the time of “entry” or at some limited or unlimited time thereafter.21 Section 212(a) of the...
INA\textsuperscript{22} similarly lists thirty-three classes of excludable aliens. Section 241(a)(1)\textsuperscript{23} provides that an alien is \textit{deportable} if “at the time of entry [he] was within one or more of the classes of aliens \textit{excludable} by the law existing at the time of such entry.”\textsuperscript{24} Not only is an alien excludable for belonging to any of the classes included in section 212(a); he is also deportable if, although technically excludable, he somehow succeeds in making an “entry” into the country.

The issue of “entry” may also arise under the criminal provisions of the INA, particularly those dealing with alien smuggling.\textsuperscript{25} In this context, the “entry” of the smuggled alien rather than the “entry” of the accused is important.\textsuperscript{26}

The above discussion illustrates that, for an alien (or for one charged with assisting the illegal “entry” of an alien), much depends on whether an “entry” has occurred. The determination of this issue is significantly more complicated than it might seem because the term “entry” has acquired a special technical meaning.\textsuperscript{27}

\begin{center}
\begin{footnotesize}
INS, 511 F.2d 947 (9th Cir. 1975); Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974); In re Sanchez, 17 I. & N. Dec. 218 (1980). Under this section and others providing for deportation upon the occurrence of an event some time after “entry,” the alien will seek to establish that an “entry” did not occur at a particular time. The issue in these cases is not the type of proceeding to which the alien will be entitled, but whether he should be deported.


\textsuperscript{22} 8 U.S.C. § 1182(a) (1982).
\textsuperscript{24} \textit{Id.} (emphasis added).
\textsuperscript{25} 8 U.S.C. § 1324(a) (1982) provides in part:
Any person . . . who—
(1) brings into or lands in the United States . . . or attempts . . . to bring into or land in the United States . . . ; [or]

\begin{itemize}
\item (4) wilfully or knowingly encourages or induces, or attempts to encourage or induce . . . the entry into the United States of—
\item any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony
\end{itemize}


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The Basic Definition of "Entry"

No statutory definition of "entry" existed prior to 1952. Therefore, in early cases dealing with the exclusion, deportation, and criminal provisions of the immigration laws which used the term "entry," courts were required to develop a judicial interpretation. The Supreme Court defined "entry" as "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." This interpretation and subsequent judicial modifications became the basis of the statutory definition set forth in section 101(a)(13) of the INA which provides:

The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

The Board of Immigration Appeals has developed the following four-part test for determining if an "entry" has occurred:

An "entry" involves (1) a crossing into the territorial limits of the United States, i.e., physical presence; plus (2) inspection and admission by an im-

32. Id. (emphasis in original). Authorities have consistently agreed that "entry" has the same meaning in all immigration law contexts. Referring to the statutory definition, the court in United States v. Oscar, 496 F.2d 492 (9th Cir. 1974), noted that "[i]t is unlikely that Congress would define a term in section 101 for use throughout Chapter 12 [the INA] if it intended the term to have different meanings in different sections of the chapter." Id. at 494. Accord United States v. Kavazanjian, 623 F.2d 730, 737 n.13 (1st Cir. 1980). Cf. Note, Administrative Law—Status of Alien—Paroled Alien Is Not Within the United States, 27 Geo. Wash. L. Rev. 373, 375-77 (1959), which suggests that the meaning of the phrase "within the United States," often equated with "entry," should vary depending on what an alien seeks.
33. The Board of Immigration Appeals was created under regulations promulgated by the Attorney General. It is a quasi-judicial body with exclusively appellate functions and is entirely separate from the Immigration and Naturalization Service. Appeals to the Board may be taken from, inter alia, decisions of immigration judges in exclusion and expulsion cases. Selected decisions of the Board are designated by the Board as precedents to be followed in all future cases. 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure §§ 1.10a-1.10c (1983). In this Comment, references to decisions by "the courts" include Board decisions because of their precedential significance.
The following discussion will combine a phrase-by-phrase analysis of the statutory definition of "entry" with an examination of the four parts of this formula.

**ELEMENTS OF THE STATUTORY DEFINITION**

"Any Coming of an Alien"

In the earliest immigration statutes, Congress probably intended the term "entry" to refer to an alien's first arrival in the United States. However, the Supreme Court long ago concluded that the provisions of the immigration laws were intended to apply to any entry by an alien, regardless of a previous "entry" or residence in the United States. This "re-entry" rule is particularly important in cases where the government seeks to deport an alien under section 241(a) of the INA for committing a particular act or acquiring a particular status within five years after "entry." Under that section, the five-year period begins to run from the latest "entry," not necessarily the original "entry."


38. *See, e.g.*, 8 U.S.C. §§ 1251(a) (1982) (institutionalization at public expense for a mental disease or defect) id. at (3); (conviction of a crime of moral turpitude) id. at (4); (becoming a public charge) id. at (8); (aiding and abetting illegal entry of aliens) id. at (13); (conviction for failure to register as an alien) id. at (15).

Although "entry" refers to both an original "entry" and a "re-entry," the acts which constitute "re-entry" may vary with the status of the alien. A lawful permanent resident alien may, under certain circumstances, depart from and return to the United States without being subjected to the consequences of an "entry." Other aliens, however, are deemed to make an "entry" upon each return.

It should be noted that the terms "entry" and "lawful admission" are not synonymous. "Entry" applies to both legal and illegal entries into the United States. Illegal entry can be accomplished in a variety of ways but, if apprehended, the alien is always subject to deportation because he has made an "entry."
To make an "entry," an alien must cross into the territorial limits of the United States; he must be physically present within the country's borders. Because this requirement is usually susceptible to precise measurement, it is seldom an issue. A more important consideration under this portion of the definition of "entry" is the distinction made between mere physical presence and physical presence coupled with freedom from official restraint. Merely crossing the international border does not necessarily constitute "entry." Rather, when an alien is detained pending determination of his right to enter, he is regarded as "stopped at the limit of our jurisdiction" although he is physically within the borders of the United States. This fiction of being stopped at the border has been consistently followed, the rationale being that while the alien is subject to official restraint or custody he has not been admitted into the United States and has therefore not made an "entry."

Of course, in addition to bearing the consequences of having made an "entry," the illegal entrant is also entitled to the rights and protections available in deportation proceedings. See supra notes 10-19 and accompanying text. See also United States ex rel. Lam Fo Sang v. Esperdy, 210 F. Supp. 786, 790 (S.D.N.Y. 1962); In re Estrada-Betancourt, 12 I. & N. Dec. 191 (1967).

45. See supra text accompanying note 34.
47. One Board of Immigration Appeals decision does illustrate a potential problem. In In re Barreto, 15 I. & N. Dec. 498 (1975), an alien submitted to pre-flight inspection by a United States immigration officer in Toronto, Canada. Initially the officer stamped the alien's passport and visa approving admission into the United States, but, before the airline flight departed, the officer crossed out the admission stamps, having become suspicious of the alien's grounds for admission. Pursuant to the instructions of the immigration officer, the alien reported to the Chicago immigration office upon her arrival in the United States and was placed in exclusion (rather than deportation) proceedings. The Board found that exclusion proceedings were appropriate because the alien had not achieved physical presence within the geographical boundaries of the United States when the admission stamps were cancelled and therefore had not effected an "entry." Id. at 500. Presumably, if the alien had been physically present within the United States when admission was approved, her right to remain in the country could have been questioned only in deportation proceedings because she would have had an "entry." See In re V—Q—, 9 I. & N. Dec. 78 (1960). Barreto's subsequent physical presence did not constitute an "entry" because she was never free of official restraint. See infra notes 48-71 and accompanying text.
48. See supra text accompanying note 34.
49. See, e.g., United States v. Ju Toy, 198 U.S. 253 (1905) (Holmes, J.) (an alien who arrived in the United States but was detained aboard his ship pursuant to orders of an immigration officer had not made an "entry").
50. Id. at 263.
51. See Kaplan v. Tod, 267 U.S. 228, 230 (1925) (harborage at Ellis Island); United States v. Oscar, 496 F.2d 492, 493 (9th Cir. 1974) (direction to secondary inspection area for further investigation); United States v. Vasilatos, 209 F.2d 195, 197 (3d Cir. 1954) (detention on board ship); In re Cenatice, 16 I. & N. Dec. 162, 165 (1977) (detention on board ship and at alien detention facility); In re Pierre, 14 I. & N. Dec. 467, 469 (1973) (detention on board ship). The enactment of the statutory definition of "entry" in 1952 did not affect judicial interpretation of the term regarding free-
Such a rule is necessary in a practical sense because most of the designated ports of entry are some distance inside the borders of the United States. However, physical presence within the confines of a port of entry does not necessarily connote physical restraint. An alien's physical presence may be accompanied by freedom from restraint and result in an “entry” even though the two elements coincide at a port of entry.

Apparently neither the length nor the timing of an alien's detention affects his status as a non-entrant. The determination of an alien's right to enter may take months or years. An alien is deemed to enjoy only a “temporary haven” in the United States during this time and any delays which occur as a result of his efforts to gain admission do not elevate his position to that of an entrant. Additionally, the Supreme Court has held that detention of an alien after an order of exclusion has been rendered does not result in “entry” of the alien.

To be deemed subject to official restraint, an alien need not be in the actual physical custody of the Immigration and Naturalization Service (hereinafter referred to as “the Service”). He may instead be held in “constructive custody” which can take at least two forms.

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52. In a literal and physical sense a person coming from abroad enters the United States whenever he reaches any land, water or air space within the territorial limits of this nation. But the actual clearance of persons who seek admission in regular course is accomplished at designated stations, many of them located as a matter of convenience some distance inside the national boundary. In these circumstances, those who have come from abroad directly to such a station seeking admission in regular course have not been viewed by the courts as accomplishing an “entry” by crossing the national boundary in transit or even by arrival at a port so long as they are detained there pending formal disposition of their requests for admission.

53. For example, in United States v. Martin-Plascencia, 532 F.2d 1316, 1317 (9th Cir.), cert. denied, 429 U.S. 894 (1976), the court held that an adolescent alien who had crawled through an opening in a border fence into the premises of a port of entry had made an “entry” because he was never subject to any type of official restraint.

54. In In re Cenatice, 16 I. & N. Dec. 162 (1977), aliens who arrived from Haiti were detained on board their boat and later at an alien detention facility for approximately eleven months prior to a determination of excludability. And in United States ex rel. Tom We Shung v. Murff, 176 F. Supp. 253 (S.D.N.Y. 1959), aff'd, 274 F.2d 667 (2d Cir. 1960), determination on an alien's application for admission was pending for eleven years.


First, the Service may entrust the alien to another person or entity who physically detains him. For example, an alien who is brought to the United States by a carrier must be held by the carrier until the alien's admissibility is determined. While so detained, the alien is subject to official restraint and is therefore a non-entrant. The same is true when the Service entrusts an alien to a social service agency. Additionally, detention by non-immigration law enforcement officers constitutes constructive custody when they apprehend an alien at the border and hold him for transfer to the Service.

The second form of constructive custody does not involve actual physical detention. An alien who has come into Service custody prior to effecting an "entry" and who is released on bond while awaiting either determination of his right to enter the United States or transportation out of the country after exclusion, is in the constructive custody of the Service. Additionally, section 212(d)(5)(A) of the INA allows the Attorney General to temporarily "parole" an alien into the United States while the alien's right to lawfully enter the country is determined. Constructive custody in the form of parole, like actual custody of an alien pending determination of his admissibility, does not constitute an "entry."
An alien might also be considered under constructive restraint although not in physical custody when he is observed attempting to enter the country illegally. Earlier cases held that an alien who was under constant surveillance immediately before, during, and after crossing the border had not made an "entry." However, recent decisions suggest that an alien may make an "entry" even though Service officers observe him surreptitiously crossing the border. These cases do not specifically repudiate the earlier decisions. Rather, they simply conclude that an "entry" has occurred under these circumstances without discussing whether the observation amounts to constructive restraint. Whether constant observation of an alien making a surreptitious crossing amounts to constructive restraint appears to be unsettled.

An alien is generally deemed to have effected an "entry" upon his release from custody because he is then free from any legal re-
straints imposed by the immigration laws. However, revocation of parole does not necessarily result in an "entry." Even prolonged inaction by the Service after revoking an alien's parole does not affect the alien's status as a non-entrant.

Escape from actual or constructive custody may be held to be an "entry," albeit an illegal "entry." Courts have refused to extend the "fiction" of constructive custody to the situation where an alien escapes from Service custody after issuance of an exclusion order or while in transit from one foreign country to another. The rationale is that such an alien is in the same position as one who crosses the border surreptitiously. However, the Board of Immigration Appeals apparently makes a distinction between those cases where exclusion proceedings are pending and those where the alien's status or admissibility is settled. The Board has held that after a notice that exclusion proceedings will be held has been served on a detained alien, his subsequent escape does not elevate his status to that of an entrant. The rationale behind this position is that after the notice is served, authority over the alien continues until excludability has been determined, regardless of the alien's escape.

66. Siu Fung Luk v. Rosenberg, 409 F.2d 555, 558 (9th Cir. 1969). In that case, after finding an alien excludable, the Service temporarily paroled him into the United States while he awaited arrangements for his transportation out of the country. Parole was revoked after approximately four months but transportation arrangements were not completed until nearly twenty months later. The court held that this delay, like delay in determining an alien's right to enter, did not result in an "entry." Id.
67. United States ex rel. La Barbera v. Commissioner, 61 F.2d 573, 574 (2d Cir. 1932) (Hand, J.).
69. United States ex rel. La Barbera v. Commissioner 61 F.2d 573, 574 (2d Cir. 1932) (such an alien is no different from one who "entered by stealth and secreted himself" for a period of time); United States ex rel. Lam Fo Sang v. Esperdy, 210 F. Supp. 786, 790 (S.D.N.Y. 1962) (alien who escaped from custody of an airline while in transit from one foreign country to another "was no different from that of a seaman who had jumped ship or a 'wetback' who entered the United States by swimming the Rio Grande"). Accord United States v. Kavazanjian, 623 F.2d 730, 739 (1st Cir. 1980).
70. In re Lin, I.D. No. 2900 (BIA 1982).
71. Id. Previously the Board had held that an alien who escaped from his ship after the Service had ordered that he be detained effected an "entry." In re A—, 9 I. & N. Dec. 356, 358 (1961). In an attempt to reconcile its holding in Lin with In re A—, the Board stated the following:
Whether the applicant is . . . paroled into the United States or . . . kept in detention at a Service facility [after service of the notice] is not determinative. His escaping from Service detention does not place him in the same status as an alien who manages to evade inspection by entering the United States surreptitiously. He has been inspected but not admitted. We therefore, do not choose to extend our decision in [In re A—] to aliens physically in this country, who are detained pending exclusion proceedings, and who manage to escape from detention.

In re Lin, I.D. No. 2900 (BIA 1982). The Board's reasoning is difficult to reconcile with
An alien's place of "entry" for venue purposes is generally wherever his physical presence within the United States coincides with freedom from official restraint. He is considered free from official restraint when the Service grants him permission to "enter," regardless of whether he chooses to remain at his site of detention.²⁷

Courts have made a distinction between the terms "entry" and "landing." Like "entry," the term "landing" is a word of art, with its own technical meaning.²³ "Landing" is a broader concept than "entry" in that once physical presence occurs, the landing is ordinarily complete.²⁴ "Landing" therefore does not require freedom from official restraint.²⁵

"From a Foreign Port or Place or From an Outlying Possession"

In addition to requiring physical presence and freedom from official restraint, "entry" necessarily contemplates an arrival from some point outside the country.²⁶ Definitional provisions of the INA aid in the determination of what constitutes coming "from a foreign port or place." The term "United States," when used in a geographical sense, is defined in section 101(a)(38) of the INA²⁷ as "the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States."²⁸ "Foreign state" as defined in section 101(a)(14)²⁹ "includes outlying possessions of a foreign state,

the holding in United States ex rel. La Barbera v. Commissioner, 61 F.2d 573 (2d Cir. 1932). See supra notes 67-69 and accompanying text. The only factual difference between Lin and La Barbera is that the alien in La Barbera had already been ordered excluded while the alien in Lin was awaiting disposition of his application for admission.

²² See United States v. Vasiliatos, 209 F.2d 195, 197 (3d Cir. 1954); Lazarescu v. United States, 199 F.2d 898, 899-901 (4th Cir. 1952). In both of these cases, an alien crewman was given permission to "enter" at one port but chose to remain on board his ship until it reached the next port. Proper venue for deportation proceedings was at the first port where freedom from official restraint was coupled with physical presence.


²⁴ Id.

²⁵ The distinction between "landing" and "entry" was illustrated in In re Lewiston-Queenston Bridge, 17 I. & N. Dec. 410 (1980). In that case the owner of an international bridge was charged with violating section 271(a) of the INA. 8 U.S.C. § 1321(a) (1982). That section imposes penalties on transportation facilities which bring aliens to the United States and fail to prevent them from "landing" at a place other than one officially designated as a port of entry. The Board of Immigration Appeals held that imposition of a penalty on a transportation facility is inappropriate when an alien makes a "landing" at a port of entry but somehow manages to effect an illegal "entry." 17 I. & N. Dec. at 413.


²⁸ Id.

but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states.” And section 101(a)(29) defines “outlying possessions of the United States” as “American Samoa and Swains Island.” An alien arriving from any place not included in the definition of United States (that is, a foreign state or an outlying possession of the United States) would be making an “entry.”

Section 212(d)(7) of the INA injects an additional consideration into this issue. That section provides that an alien who leaves “Guam, Puerto Rico or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States” shall be excludable under certain circumstances. Under this provision, aliens who have been inspected and admitted to Guam, Puerto Rico, or the Virgin Islands of the United States must submit to an additional inspection by immigration officials when they travel to any other place which is part of the United States because they are considered to be proceeding from a foreign area to the United States. The purpose of section 212(d)(7) was to prevent excludable aliens from using arrival in these insular possessions as a means of “entry” into the United States. Courts have therefore held that the section does not apply to lawful permanent resident aliens who travel to and return from Guam, Puerto Rico, or the Virgin Islands of the United States. Apparently, only aliens who are not lawful permanent residents of the United States make an “entry” when coming to the United States from an insular possession.

82. Id.
86. Id.
88. The Supreme Court considered an interesting but somewhat peculiar problem regarding coming from a foreign port or place in Barber v. Gonzales, 347 U.S. 637 (1954). The case concerned an “alien” who was born in the Philippine Islands as a national of the United States. (“National of the United States” is defined in 8 U.S.C. § 1101(a)(22) (1982) as “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”) The “alien” came to the continental United States in 1930 and lived in this country continuously from that date. In 1946 the Philippine Islands received final independence from the United States, resulting in a change in status of persons born there from nationals to aliens. The Service sought to deport the alien on the basis of 1941 and 1950 convictions for crimes of moral turpitude. The Court held that the alien had never made an “entry”
In interpreting the coming “from a foreign port or place” portion of the “entry” definition, courts have created a fiction regarding the nature of vessels as United States territory. “[A]n American vessel is deemed to be a part of the territory of the state within which its home port is situated, and as such a part of the territory of the United States.” When an alien embarks on such a vessel at a port of the United States, goes to sea, and returns to this country without having been in any foreign port or place, his return is not an “entry.” In essence, the alien has never left the United States and therefore could not be coming from a foreign port or place. On the other hand, if the vessel goes into a foreign port and returns to the United States, the alien’s return is an “entry.” This is so regardless of whether he goes ashore in the foreign port. However, an alien does not make an “entry” into the United States by embarking on an American vessel in a foreign port because such a vessel outside the United States is not deemed to be United States territory.

"Whether Voluntary or Otherwise"

Pursuant to the statutory definition, an “entry” into the United States may be accomplished by either voluntary or involuntary means. Several important considerations pertaining to the manner in which an alien attains physical presence in the United States may determine whether an “entry” has been made.

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89. Weedin v. Banzo Okado, 2 F.2d 321, 322 (9th Cir. 1924) (quoting In re Ah Sing, 13 F. 286, 289 (9th Cir. 1882)). Accord Ex parte Kogi Saito, 18 F.2d 116, 118 (W.D. Wash. 1927); Ex parte T. Nagata, 11 F.2d 178, 179 (S.D. Cal. 1926).
Voluntary Entries

An alien may voluntarily cross into the United States either by presenting himself for inspection at a designated port of entry or by evading such inspection. If the alien presents himself for inspection, he is generally not deemed to have made an “entry” until he is advised of his right to enter by immigration authorities.\textsuperscript{94}

Permission to enter the United States may be granted to an alien in a variety of forms. Examples range from the conditional landing permit, which allows an alien to stay for only a limited period of time,\textsuperscript{95} to lawful permanent resident status, which permits the alien to remain indefinitely.\textsuperscript{96} However, once admission in any form has been granted, the alien has made an “entry.”

An alien who submits to inspection and is admitted has not necessarily effected a legal “entry.” If the alien obtains permission to enter by making fraudulent misrepresentations to the inspector\textsuperscript{97} or by falsely claiming to be a United States citizen,\textsuperscript{98} his “entry” is considered one without inspection and therefore illegal.\textsuperscript{99} If discovered after such an “entry,” the alien is deportable under section 241(a)(2) of the INA.\textsuperscript{100}

\begin{footnotesize}
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\item Any delay or detention pending determination of the alien’s right to enter does not elevate his status to that of an entrant. \textit{See supra} notes 48-71 and accompanying text.
\item 8 U.S.C. § 1282 (1982). This permit allows an alien crewman to come into the United States temporarily for not more than twenty-nine days while his ship is in port. The permit differs from parole in that the alien is free from official restraint. Stanisic v. INS, 393 F.2d 539, 543 (9th Cir. 1968), \textit{rev’d on other grounds}, 395 U.S. 62 (1969). \textit{Cf. In re Dubiosi}, 191 F. Supp. 65, 66 (E.D. Va. 1961) (no “entry” was made because, although a permit had been issued, the alien remained under official restraint until arrested for alien smuggling). The crewman is considered to have made an “entry” and may only be deported, not excluded, if he breaches the conditions of his admission. \textit{See Couto v. Shaughnessy}, 218 F.2d 758 (2d Cir.), \textit{cert. denied}, 349 U.S. 952 (1955); United States \textit{ex rel. Szajimer v. Esperdy}, 188 F. Supp. 491 (S.D.N.Y. 1960).
\item \textit{See Cacho v. INS}, 547 F.2d 1057 (9th Cir. 1976); Del Castillo v. Carr, 100 F.2d 338 (9th Cir. 1938).
\item \textit{See Reid v. INS}, 420 U.S. 619 (1975); Bufalino v. INS, 473 F.2d 728 (3d Cir.), \textit{cert. denied}, 412 U.S. 928 (1973); Ben Huie v. INS, 349 F.2d 1014 (9th Cir. 1965); \textit{In re KolK}, 11 I. & N. Dec. 103 (1965).
\item Aliens who enter as citizens, rather than as aliens, are treated substantially differently by immigration authorities. The examination to which citizens are subjected is likely to be considerably more perfunctory than that accorded aliens. . . . The net effect . . . of a person’s entering . . . as an admitted alien is that the immigration authorities . . . require and obtain information and a variety of records that enable them to keep track of the alien after his entry. Since none of these requirements is applicable to citizens, an alien who enters by claiming to be a citizen has effectively put himself in a quite different position from other admitted aliens, one more comparable to that of a person who slips over the border and who has, therefore, clearly not been inspected. Reid v. INS, 420 U.S. 619, 624-25 (1975) (quoting Goon Mee Heung v. INS, 380 F.2d 236, 237 (1st Cir.), \textit{cert. denied}, 389 U.S. 975 (1967)).
\item \textit{See supra} note 43.
\end{enumerate}
\end{footnotesize}
An alien can also voluntarily come into the United States by evading inspection.\textsuperscript{101} If intentional and free from official restraint, a crossing at a place other than one designated as a port of entry is clearly an illegal "entry."\textsuperscript{102} An alien's technical admissibility at the time of such an illegal "entry" does not save him from being deportable.\textsuperscript{103} Moreover, even a temporary evasion of the inspection process will produce an "entry."\textsuperscript{104}

Even if an alien is physically present and free of official restraint, he may avoid the consequences of an "entry" if he intends to present himself for inspection (rather than evade it) and follows the ordinary path from the international border to the nearest inspection station.\textsuperscript{105} As noted above,\textsuperscript{106} such a rule is necessary because most ports of entry are located some distance from the actual territorial boundaries.\textsuperscript{107} The question of an alien's intent to report for inspection is a factual one and its resolution often rests on whether the surrounding circumstances suggest that the alien was following the normal route to the nearest inspection station.\textsuperscript{108} The alien must not only proceed by the \textit{usual path} to an inspection station; he must also proceed to the \textit{nearest} inspection station. Proceeding to an inspection

\textsuperscript{101} See \textit{In re Pierre}, 14 I. & N. Dec. 467 (1973); \textit{see also supra} note 34 and accompanying text.


\textsuperscript{103} \textit{In re Ruis}, I.D. No. 2923 (BIA 1982).

\textsuperscript{104} \textit{United States v. Kavazanjian}, 623 F.2d 730, 739 n.19 (1st Cir. 1980).

\textsuperscript{105} \textit{Thack v. Zurbrick}, 51 F.2d 634, 635 (6th Cir. 1931).

\textsuperscript{106} \textit{See supra} note 52 and accompanying text.

\textsuperscript{107} \textit{In re Phelisna}, 551 F. Supp. 960 (E.D.N.Y. 1983), the court rejected actual intent to evade inspection as an element of "entry." Rather, the court indicated that "[i]t would be enough that the alien had no intention, whether through ignorance or otherwise, to follow the usual path to an inspection station." \textit{Id.} at 963. The court placed on the government the burden of proving that an alien landing at a point far distant from the inspection station intended to submit himself for inspection and was on his way to do so, thus not having made an "entry." \textit{Id.} at 963-64; \textit{cf. In re Pierre}, 14 I. & N. Dec. 467, 468 (1973), which lists "actual and intentional evasion of inspection" as one of the elements of "entry."

\textsuperscript{108} See \textit{supra} note 52 and accompanying text.
Involuntary Entries

The statutory definition of “entry” provides that an “entry” occurs whether an alien’s coming into the United States is “voluntary or otherwise.” Early cases, decided before enactment of the 1952 statutory definition of “entry,” held that any coming of an alien into the country from a foreign port or place constituted an “entry” regardless of any involuntariness. Many of these cases involved aliens whose original entries were illegal and who thereafter departed from the country. The courts invariably held that when such an alien returned to the United States, he made an “entry” even if his departure was unintentional, involuntary or unknowing. When an illegal alien’s departure was voluntary rather than involuntary, the courts also consistently concluded that an “entry” had been made.

109. For example, in In re Estrada-Betancourt, 12 I. & N. Dec. 191 (1967), a group of aliens had crossed the Rio Grande by boat and landed in the United States approximately twenty miles from Brownsville, Texas, the nearest inspection station. Instead of proceeding toward Brownsville, the aliens traveled ten miles in another direction to an airport where they were taken into custody by Service officers. The Board rejected the Service’s position that the aliens had not made an “entry” because, according to their testimony, they intended to present themselves for inspection at Miami, Florida where they expected to receive more favorable treatment as refugees. The Board concluded that expulsion proceedings were appropriate because the aliens, by failing to proceed to the nearest inspection station, had effected an “entry.” Id. at 196. The Board stated that “only utter chaos in enforcement of the immigration laws could result from permitting aliens to proceed to inspection points they believe will best suit their own interest.” Id.

110. See supra text accompanying notes 28-29.

111. See, e.g., Zurbrick v. Borg, 47 F.2d 690 (6th Cir. 1931). In that case, the court held that an alien’s trip from New York to Detroit along a train route which passed through Canada subjected him to exclusion upon his attempted re-entry. That the alien had not left the train while in Canada was immaterial to the court, “for, having passed out of the country, he was an immigrant, and, not having an unexpired immigration visa, he was not entitled to re-enter.” Id. at 691.

112. See, e.g., Taguchi v. Carr, 62 F.2d 307 (9th Cir. 1932). There, an illegal alien had embarked as a crewman on an American vessel, became shipwrecked, and was forced to land on a Mexican island. Noting that it had no discretion in the matter, the court reluctantly rejected the alien’s claim that he was not subject to exclusion because he had not intentionally landed on foreign soil. Because the alien was technically coming from a foreign country, he was subject to the immigration laws as if he had never resided in the United States. Id. at 308.

113. See, e.g., Ward v. DeBarros, 75 F.2d 34 (1st Cir. 1935). The facts of this case were very similar to those in Zurbrick v. Borg, 47 F.2d 690 (6th Cir. 1931) (discussed supra note 111), except that DeBarros had specifically testified that he did not know he was entering a foreign territory. (In Borg the court had not mentioned whether the alien lacked such knowledge.) Following the strict interpretation of “entry,” the court held that ignorance of the location of the border or of one’s presence outside the United States had no effect on the determination of “entry.” What the traveller did in fact, not what he knowingly intended to do, was controlling. The court did intimate, however, that had the alien been taken out of the country by force or induced to go out through fraud or deceit, the holding might have been different. Id. at 35.

114. E.g., United States ex rel. Stapf v. Corsi, 287 U.S. 129 (1932) (voyage to
The alien's return in most of these cases, however, could fairly be characterized as voluntary, making the holdings arguably less harsh than those in cases where the departure and return were both involuntary.

These early cases involving "re-entry" of illegal aliens represent application of the so-called "per se" or "physical passage" doctrine, which emphasizes the fact of crossing the border rather than the alien's intent or knowledge in doing so.118 Some courts also used this approach in cases where an alien was brought into the country involuntarily for criminal prosecution or imprisonment. According to these courts, the alien's arrival from a foreign country was controlling; the involuntariness of the arrival was irrelevant.119 Other courts, however, rejected the "per se" doctrine when an alien was brought into the country under official custody.117 The few recent opinions which discuss this issue agree with the latter position.118 The conclusion that no "entry" occurs under these circumstances is most consistent with the theory that an alien does not make an "entry" unless he is free from official restraint.119 It also appears to be the better rule because of the patent injustice in forcing an alien to come into the country and then subjecting him to the consequences of an "entry."

Germany); United States v. Maisel, 183 F.2d 724 (3d Cir. 1950) (voyage to Philippine Islands); Del Castillo v. Carr, 100 F.2d 338 (9th Cir. 1938) (one day trip to Ensenada, Mexico); United States ex rel. Roovers v. Kessler, 90 F.2d 327 (5th Cir. 1937) (voyage to various Central American and Caribbean ports); McCandless v. United States ex rel. Pantoja, 44 F.2d 786 (3d Cir. 1930) (voyage to Buenos Aires); United States ex rel. Drachmos v. Hughes, 26 F. Supp. 192 (D.N.J. 1938), aff'd, 110 F.2d 662 (3d Cir. 1940) (pleasure trip to Canada); In re O'D—, 3 I. & N. Dec. 632 (1949) (flight to Puerto Rico to avoid criminal prosecution in New York).


116. In Blumen v. Haff, 78 F.2d 833 (9th Cir.), cert. denied, 296 U.S. 644 (1935), the court held that aliens who were extradited to the United States to answer grand larceny charges had made an "entry" and were subject to expulsion proceedings. Accord In re O'D—, 3 I. & N. Dec. 632 (1949).

117. In United States ex rel. Ling Yee Suey v. Spar, 149 F.2d 881 (2d Cir. 1945), the court held that aliens who were arrested for rioting on board their ship and brought into the United States for prosecution had not made an "entry." The same court followed this holding in a series of cases involving aliens who were brought into the United States either as war prisoners or for internment as security risks. United States ex rel. Bradley v. Watkins, 163 F.2d 328 (2d Cir. 1947); United States ex rel. Ludwig v. Watkins, 164 F.2d 456 (2d Cir. 1947); United States ex rel. Paetau v. Watkins, 164 F.2d 457 (2d Cir. 1947). Accord United States ex rel. Camezon v. District Director, 105 F. Supp. 32 (S.D.N.Y. 1952) (alien brought in under custody for prosecution as a stowaway).


119. See supra notes 48-71 and accompanying text.
As noted above, cases decided prior to the enactment of the statutory definition held that an alien who departed from and returned to the United States, whether voluntarily or involuntarily, "re-entered" upon his return.120 These decisions seem to have current validity for aliens who are not lawful permanent resident aliens, particularly because the words "whether voluntary or otherwise" were included in section 101(a)(13) of the INA.121 However, as discussed below, the statutory definition of "entry" includes an exception to this language for lawful permanent resident aliens.122 Because courts and commentators prior to 1952 failed to make a distinction between lawful permanent resident aliens and other aliens in discussing the "voluntariness" issue,123 and because of extensive judicial interpretation of the statutory exception pertaining to lawful permanent resident aliens,124 the issue as it relates to these other aliens is somewhat unsettled. Currently, no definitive statement of the courts' position regarding involuntary "entry" by non-lawful permanent resident aliens exists.

The Lawful Permanent Resident Alien Exception

In recent years, lawful permanent resident aliens have received special treatment by Congress and the courts regarding the issue of "entry." Because this was not always so, a review of the historical development of the statutory and judicial rules pertaining to these aliens is necessary to an understanding of the current law in this area.

Historical Foundations

As in the cases noted above involving other aliens,125 courts prior to 1952 generally adhered to a "per se" interpretation of "entry" when deciding cases involving re-entry of lawful permanent resident aliens. Most of these cases concerned aliens who voluntarily departed from the United States and returned after some period of time.126

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120. See supra notes 110-114 and accompanying text.
122. See infra notes 138-182 and accompanying text.
123. See, e.g., Gordon, supra note 35; Recent Cases, supra note 115; Note, The Meaning of "Entry," supra note 39.
124. See infra notes 138-182 and accompanying text.
125. See supra notes 110-124 and accompanying text.
126. E.g., United States ex rel. Volpe v. Smith, 289 U.S. 422 (1933) (brief visit to Cuba); Lewis v. Frick, 233 U.S. 291 (1914) (one day trip to Canada to procure "a woman of immoral purpose"); Lapina v. Williams, 232 U.S. 78 (1914) (three month trip to Russia to visit mother); United States ex rel. Schlimgen v. Jordon, 164 F.2d 633 (7th Cir. 1947) (voyage as seaman on American vessel which visited various foreign ports); United States ex rel. Doukas v. Wiley, 160 F.2d 92 (7th Cir. 1947) (short trips to Canada for medical treatment); Zurbrick v. Woodhead, 90 F.2d 991 (6th Cir. 1937) (shopping trip to Canada for a few hours); Canciamilla v. Haff, 64 F.2d 875 (9th Cir. 1933) (two trips to Italy); Jackson v. Zurbrick, 59 F.2d 937 (6th Cir. 1932) (visit to
The courts found an “entry” whenever an alien left the United States and returned from a foreign country, regardless of the purpose or length of his absence. The results were often quite harsh.\textsuperscript{127} While most courts followed this strict approach,\textsuperscript{128} some indicated that they did so only because they felt bound to follow precedent.\textsuperscript{129}

A few courts did eventually adopt a more flexible approach, at least in cases where the lawful permanent resident’s departure could be characterized as involuntary or unintentional.\textsuperscript{130} The strongest
impetus for excepting involuntary departures from the concept of “entry” for lawful permanent resident aliens came in Di Pasquale v. Karnuth. In that case the court held that “the intent of a carrier, unknown to the alien, to carry him across a border and back again, upon a route whose termini are within the United States, should not be imputed to him.” The court drew upon what it believed to be the legislative intent behind the deportation laws in reaching this conclusion, stating that it could not believe “that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous.” It went on to observe that while “we should be free to rid ourselves of those who abuse our hospitality . . . it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards.”

The Supreme Court adopted the Di Pasquale court’s reasoning in Delgadillo v. Carmichael, where the circumstances of war and not the alien’s voluntary act had caused him to be on foreign soil. The Court concluded that Congress could not have meant to subject an alien to the consequences of an “entry” under such “fortuitous and capricious” circumstances. Lower courts followed this approach in subsequent cases.

leads to absurd and unjust results and concluded that “one who is lawfully within the country and who goes into a foreign contiguous territory during the course of a practically continuous journey originating and ending within the United States” does not make an “entry.” Id. at 798. The opinion, however, does not specifically discuss the voluntariness of the departure.

131. 158 F.2d 878 (2d Cir. 1947) (Hand, J.).
132. Id. at 879. While the alien slept, the train on which he rode, unknown to him, passed through Canada on its way from Buffalo to Detroit. Judge Hand wrote the opinion for the court, holding that the alien could not be deported for conviction of a crime involving moral turpitude committed within one year after this trip. Compare Ward v. DeBarros, 75 F.2d 34 (1st Cir. 1935); Zurbrick v. Borg, 47 F.2d 690 (6th Cir. 1931) (similar facts except that the alien involved was illegal rather than legal.) See supra notes 110-113 and accompanying text.
133. 158 F.2d at 879.
134. Id. For an early analysis of this case, see Recent Cases, Aliens—Immigration Acts of 1917 and 1924—Lawful and Unlawful Entry, 15 GEO. WASH. L. REV. 480 (1947).
135. 332 U.S. 388 (1947). The alien in Delgadillo had served on an American merchant ship during World War II. The ship was torpedoed off the coast of Cuba after which the alien was rescued and taken to Cuba. One week later he returned to the United States. Two years after this event, the alien was convicted of robbery and the government sought to deport him. The Court, however, found that no “entry” had been made as a result of the alien’s return from Cuba. Id. at 391.
136. Id. For an analysis of this case, see Recent Cases, supra note 115.
137. E.g., Schoeps v. Carmichael, 177 F.2d 391, 396 (9th Cir. 1949), cert. denied, 339 U.S. 914 (1950) (voluntary visit to Mexico); Carmichael v. Delaney, 170 F.2d 239, 242 (9th Cir. 1948) (service on a Navy ship); Yukio Chai v. Bonham, 165 F.2d 207, 208 (9th Cir. 1947) (unscheduled stop by vessel in Canada).
The Statutory Exception

When revising the immigration laws in 1952, Congress included the judicial developments of *Di Pasquale* and *Delgadillo* in the definition of "entry." The statute provides that a lawful permanent resident alien will not be regarded as making an "entry" if he can prove to the Attorney General's satisfaction that (1) his departure was *unintended* or not reasonably foreseeable or (2) his presence in a foreign country was *not voluntary*.

During the first decade after enactment of the statutory definition, courts continued to decide cases involving re-entry of lawful permanent resident aliens by considering the voluntariness of the departure. If a court found that an alien's departure or presence in a foreign country was voluntary, it concluded that an "entry" had been made. Conversely, if it found that the departure or presence was unintentional or involuntary, it concluded that no "entry" had been made. The rule under the statutory definition that an alien does not make an "entry" when his presence in a foreign country is *not voluntary* remains unchanged. However, those cases interpreting the portion of the definition dealing with *intent* to depart have generally been superseded by the relatively recent judicial developments discussed below.

The Fleuti Doctrine

In 1963 the Supreme Court drastically altered the meaning of the statutory phrase, "not intended," in the landmark case of *Rosenberg v. Fleuti*. In that case, the Court acknowledged that the alien had...
voluntarily been present in a foreign country. Nevertheless, it went beyond the literal meaning of the term “not intended” as used in the statute\textsuperscript{144} to hold that “an innocent, casual, and brief excursion by a resident alien outside this country’s borders 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.”\textsuperscript{145} The Court reasoned that Congress included the exception clause in the definition of “entry” because it wished to ameliorate the harsh consequences of the “per se” doctrine for lawful permanent resident aliens.\textsuperscript{146} It construed the intent exception of section 101(a)(13) to mean an “intent to depart in a manner which can be regarded as meaningfully interruptive of the alien’s permanent residence.”\textsuperscript{147}

To aid lower courts in determining whether a departure was “meaningfully interruptive,” the Court enumerated three factors which might be considered.

One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country.\textsuperscript{148}

The Court also suggested that other relevant factors might be devel-

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\textsuperscript{144} See Griffith, supra note 138, at 357-58.
\textsuperscript{145} 374 U.S. at 462.
\textsuperscript{146} Id. at 458. The Court recognized that the legislative history of the statute referred only to the decisions of Di Pasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947), and Delgadillo v. Carmichael, 332 U.S. 388 (1947), (see supra notes 131-136 and accompanying text) and that there was “no indication one way or the other . . . of what Congress thought about the problem of resident aliens who leave the country for insignificantly short periods of time.” 374 U.S. at 458. Nevertheless, it expressed the opinion that Congress had not intended the ameliorative effects of the exception language to be limited to the facts of those two cases. Id. The four dissenters in Fleuti argued that the language of the statute was perfectly clear in that the exception pertained only to involuntary or unintentional departures. They accused the majority of rewriting the definition (something Congress had declined to do) to exclude a permanent resident alien’s return from a brief but voluntary and intentional trip abroad, although this was not Congress’ expressed intention and, in fact, was directly contrary to the Court’s earlier holding in Bonetti v. Rogers, 356 U.S. 691, 698 (1958). 374 U.S. at 467-68 (Clark, J., dissenting).
\textsuperscript{147} 374 U.S. at 462.
\textsuperscript{148} Id.
oped "by the gradual process of judicial inclusion and exclusion."149

Application of the Fleuti Doctrine

The overwhelming majority of recent decisions concerning the subject of "entry" in immigration law have focused on application of these "Fleuti factors" and development of additional factors to determine if a lawful permanent resident alien has made an "entry" upon returning from a trip abroad.150 The determination of meaningful interruption is a question of fact,151 and the conclusions drawn by various courts are often difficult, if not impossible, to reconcile.

Courts have used various approaches to this problem, placing varying amounts of emphasis on one factor or another. In almost every case, however, the court discusses the "purpose of the visit" factor.152 The Supreme Court in Fleuti spoke of both the "purpose of the visit" and the "purpose of leaving."153 This raises the question of whether the time of formation of the purpose is relevant to a determination of meaningful interruption. In some cases, courts have held that the timing of formation of the purpose is irrelevant and that any unlawful purpose, whether formed prior to departure from the United States or after arrival in the foreign country, may serve as the basis for a finding of meaningful interruption.154 Other courts, however, have held that the unlawful purpose must be formed prior to or at the time of departure; if an alien leaves the United States for an innocent purpose but becomes involved in illegal activity while in the foreign country, his residence is not necessarily meaningfully interrupted.155

149. Id. (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877)).
150. For a general discussion of the Fleuti doctrine, see Comment, supra note 129; Griffith, supra note 138.
151. Wadman v. INS, 329 F.2d 812, 816 (9th Cir. 1964).
153. See supra text accompanying note 148.
154. E.g., Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974); Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974). Accord Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975). The accuracy of this interpretation of the Fleuti "purpose factor" is questioned in Griffith, supra note 138, at 357. But see Comment, supra note 129, at 700, (suggests that the time of formation of the unlawful purpose should be irrelevant).
155. E.g., Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972). Cf. Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977) (unlawful purpose formed after departure accompanied by surreptitious return).
Courts also disagree about the relevance of successful accomplishment of the alien's purpose, whenever it is formed. One court has held in effect that if the alien fails to accomplish his purpose, he does not make an "entry" when he returns from a foreign country. Another has held that if the purpose is accomplished either before or after the alien returns to the United States, he makes an "entry." Because the Court in Fleuti listed the purpose of the visit as a factor and not the successful accomplishment of that purpose, actual accomplishment should be irrelevant to whether a departure is meaningfully interruptive.

Except for these two points of disagreement, when an alien's purpose in unlawful or "contrary to some policy reflected in our immigration laws," courts will usually find that an alien's departure was intended to be meaningfully interruptive of his residence. This demonstrates the emphasis that has been placed on the purpose factor. For example, courts have found that where a permanent resident alien participates in alien smuggling, drug smuggling, counterfeiting, immigration fraud, or false claim of citizen-

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156. In Yanez-Jacquez v. INS, 440 F.2d 701 (5th Cir. 1971), an alien had left the United States and traveled into Mexico in order to avenge an assault and robbery committed on him in Mexico the previous day. He returned to the United States without having accomplished his goal. The court held that the record was insufficient to show that the alien's return constituted an entry. Id. at 704.

157. In Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977), an alien who departed from the country was unsuccessful in carrying out a meeting in Mexico intended to further a plan to smuggle other aliens into the United States. He was, however, successful in carrying out his part in the smuggling plan after his return to the United States. The court, finding that Longoria-Castenada had made an "entry," attempted to reconcile its decision with that of Yanez-Jacquez v. INS, 440 F.2d 701 (5th Cir. 1971)(discussed supra note 156), by pointing out that in the latter case, the alien had not committed a crime in either the United States or Mexico; Longoria-Castenada, however, had succeeded in carrying out his unlawful purpose for departing from the country, even though this success was achieved after he had returned to the United States. 548 F.2d at 237. This distinction seems rather strained.

158. See Griffith, supra note 138, at 356.

159. See supra text accompanying note 148.

160. Although we recognize that the reason for departing the country is only one of several major factors which should be considered in determining whether a departure is a meaningful interruption of residence, we conclude that this one factor, standing alone, can be deemed sufficient to warrant a finding that a meaningful interruption of residence has occurred.


161. See, e.g., Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977); Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977); Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975); Martin-Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975); Solis-Davila v. INS, 456 F.2d 424 (5th Cir. 1972); In re Contreras, I.D. No. 2859 (BIA 1981); In re Valdovinas, 14 I. & N. Dec. 438 (1973); In re Payan, 14 I. & N. Dec. 58 (1972); In re Valencia-Barajas, 13 I. & N. Dec. 369 (1969).

162. See, e.g., Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974).

163. See, e.g., Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974).

ship in connection with a departure from and return to the United States, he has made an "entry" because his residence has been meaningfully interrupted. Where an alien's purpose in leaving the United States is lawful, courts will usually consider the other factors enumerated in *Fleuti* or additional factors not enumerated but considered pertinent to the issue of meaningful interruption.

The Court in *Fleuti* listed the length of an alien's absence from the country as a factor to be considered. However, no particular length of time is by itself determinative of a meaningful interruption. If the purpose of the trip was unlawful, almost any length of absence will be sufficient to lead to a finding of "entry." If the purpose was lawful, an absence of only a few hours or days will probably be held to be "innocent, casual, and brief" and therefore not meaningfully interruptive. If the length of the alien's absence is a month or more, his return will likely be considered an "entry." A length of absence which falls between these two guidelines will probably yield in importance to other factors the court may wish to consider.

Rarely is procurement of travel documents decisive in determining

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165. See, e.g., Bufalino v. INS, 473 F.2d 728 (3d Cir.), cert. denied, 412 U.S. 928 (1973) (but consideration under *Fleuti* is of questionable validity because the alien was not a lawful permanent resident); *In re Kolk*, 11 I. & N. Dec. 103 (1965).

166. Courts do not necessarily require that the criminal activity be in violation of immigration law, in terms of the movement of aliens across the border, in order to be "contrary to some policy reflected in our immigration laws." Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963). See cases cited *supra* notes 162-163.

167. See, e.g., Maldonado-Sandoval v. INS, 518 F.2d 278 (9th Cir. 1975) (personal business); Munoz-Casarez v. INS, 511 F.2d 947 (9th Cir. 1975) (visitation of relatives); Itzcovitz v. Selective Service, 447 F.2d 888 (2d Cir. 1971) (business training); Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir.), cert. denied, 381 U.S. 925 (1965) (vacation).

168. Of course, these factors may also be considered when the court finds that the alien's purpose is unlawful.

169. See *supra* text accompanying note 148.

170. See, e.g., Laredo-Miranda v. INS, 555 F.2d 1242, 1243 (5th Cir. 1977) (less than one day); Longoria-Castenada v. INS, 548 F.2d 233, 235 (8th Cir.), cert. denied, 434 U.S. 853 (1977) (a few hours); Cuevas-Cuevas v. INS, 523 F.2d 883, 884 (9th Cir. 1975) (12 days); Palatian v. INS, 502 F.2d 1091, 1092 (9th Cir. 1974) (two and one half days).

171. 374 U.S. at 462. See, e.g., Maldonado-Sandoval v. INS, 518 F.2d 278, 279 (9th Cir. 1975) (two or three days); *In re Cardenas-Pinedo*, 10 I. & N. Dec. 341, 342 (1963) (a few hours).

172. See, e.g., Munoz-Casarez v. INS, 511 F.2d 947, 948 (9th Cir. 1975) (30 days); Lozano-Giron v. INS, 506 F.2d 1073, 1078 (7th Cir. 1974) (27 days); *In re Janati-Ateie*, 14 I. & N. Dec. 216, 217 (1972) (30 days); *In re Abi-Rached*, 10 I. & N. Dec. 551, 551 (1964) (one month); *In re Guimaraes*, 10 I. & N. Dec. 529, 529 (1964) (one month).

173. See, e.g., Itzcovitz v. Selective Service, 447 F.2d 893, 893-94 (2d Cir. 1971) (three weeks but purpose was to fulfill a requirement of the alien's employer).
whether a departure and return constitutes an "entry," but it may add weight to other factors indicating "entry." 174 Most cases which discuss procurement of travel documents refer to the likelihood that the alien will be prompted to consider the implications of leaving the country, as suggested in Fleuti. 176

Some courts have considered other factors not enumerated in Fleuti. Examples include the distance from the United States that an alien travels 176 and the alien's minority at the time of his departure. 177

One court indicated that it would consider certain additional factors relevant to the hardship an alien is likely to suffer if deported. 178 These factors include "how long the alien had been a permanent resident of the United States, whether he had a wife and children living with him, whether he owned a business establishment . . . in the United States, the nature of the environment to which he would be deported, and his relation to that environment." 179 Although these considerations clearly bear on the hardship which an alien might suffer if deported, their relevance to meaningful interruption is questionable. The issue of "entry" deals in part with whether one is deportable; 180 other immigration law provisions set forth avenues of discretionary or mandatory relief from the hardship of deportation. 181

Courts disagree regarding whether an alien's subjective intent to resume residence in the United States after his trip abroad is perti-

174. Very few cases even mention this factor. E.g., Lozano-Giron v. INS, 506 F.2d 1073, 1079 n.25 (7th Cir. 1974); Bilbao-Bastida v. INS, 409 F.2d 820, 823 (9th Cir.), cert. denied, 396 U.S. 802 (1969); In re Guimaraes, 10 I. & N. Dec. 529, 532 (1964); In re Janati-Ataie, 14 I. & N. Dec. 216, 224 (1972).

175. See supra text accompanying note 148. However, in a case involving the issue of continuous physical presence (see infra text accompanying notes 183-191), one court indicated that procurement of travel documents for a trip may undercut rather than support the conclusion that an alien's absence was meaningfully interruptive, especially if the documents were obtained with the expectation that they would confirm continuity of presence. Kamheangpatiyooth v. INS, 597 F.2d 1253, 1259 (9th Cir. 1979).


177. Toon-Ming Wong v. INS, 363 F.2d 234, 236 (9th Cir. 1966).

178. Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974).

179. Id. at 1077-78. See also Zimmerman v. Lehmann, 339 F.2d 943, 948-49 (7th Cir.), cert. denied, 381 U.S. 925 (1965).

180. See supra notes 20-24 and accompanying text.

181. E.g., 8 U.S.C. §§ 1252(e) (discretionary suspension of deportation), 1253(h) (stay of deportation) (1982). Indeed, in Longoria-Castenada v. INS, 548 F.2d 233, 237-38 (8th Cir.), cert. denied, 434 U.S. 853 (1977), the court, while recognizing the hardship of uprooting a long-time resident, indicated that the factors outlined in Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974) (see supra notes 178-179 and accompanying text) were more properly considered in connection with application for discretionary administrative relief. Accord Palatian v. INS, 502 F.2d 1091, 1094 (9th Cir. 1974) (rejecting the nature of the environment to which the alien will be deported as a factor for consideration).
nent to the issue of meaningful interruption. The position taken by those courts rejecting it as a factor seems better reasoned because consideration of an alien’s intent to resume his residence does not aid in the determination of whether his departure was meaningfully interruptive. As used by the Supreme Court in Fleuti, the terms “intent” and “meaningful interruption” are synonymous. To say that an alien intended to resume his residence is the equivalent of saying that he did not intend to interrupt his residence. This factor therefore seems to be more of a conclusion than a consideration.

Application of the Fleuti Doctrine to the Issue of Continuous Physical Presence

The Fleuti doctrine has had a far-reaching effect in suspension of deportation cases. Section 244(a) of the INA allows the Attorney General to suspend deportation and adjust a qualifying deportable alien’s status to that of an alien lawfully admitted for permanent residence. Such an alien must have been physically present in the United States for a continuous period of not less than seven years; he must be of good moral character; and it must be evident that his deportation would result in extreme hardship to himself or his family. The federal courts of appeal have adopted the Fleuti doctrine of meaningful interruption as the test for determining “continuous physical presence” under this section.

In 1964, the Ninth Circuit Court of Appeals first applied the “meaningful interruption” standard to this issue, although the Supreme Court in Fleuti had considered “entry” rather than “continuous physical presence.” The Ninth Circuit reasoned that “continuous” was as fluid a concept as “intended.” It indicated that “[t]he question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guidelines laid down in Fleuti.”

182. The Second Circuit Court of Appeals and the Fifth Circuit Court of Appeals have treated it as relevant. Itzcovitz v. Selective Service, 447 F.2d 888, 894 (2d Cir. 1971); Yanez-Jacquez v. INS, 440 F.2d 701, 704 (5th Cir. 1971). However, the Ninth Circuit Court of Appeals and the Board of Immigration Appeals have consistently rejected it as a consideration. Munoz-Casarez v. INS, 511 F.2d 947, 949 (9th Cir. 1975); In re Janati-Ataie, 14 I & N. Dec. 216, 224-25 (1972); In re Kolk, 11 I & N. Dec. 103, 105 (1965); In re Abi-Rached, 10 I. & N. Dec. 551, 553 (1964); In re Guimaraes, 10 I. & N. Dec. 529, 531 (1964).

184. Id.
185. Wadman v. INS, 329 F.2d 812 (9th Cir. 1964).
186. Id. at 816.
Courts originally applied the Fleuti factors to the question of continuous physical presence in much the same way as they applied them to the question of "entry."\textsuperscript{187} However, in recent years the Ninth Circuit has liberalized its approach by holding that the factors outlined in Fleuti for determining meaningful interruption are only evidentiary and not conclusive.\textsuperscript{188} It reformulated the standard, holding that the court must determine "whether a particular absence during the seven-year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion."\textsuperscript{189}

The Eleventh Circuit Court of Appeals, however, has rejected this formulation and retained the Fleuti factors as the test for "continuous physical presence."\textsuperscript{180} The Supreme Court has granted certiorari in the most recent Ninth Circuit case on this issue.\textsuperscript{181} The Court's decision should resolve the conflict among the circuits and may clarify the confusion surrounding the Fleuti "re-entry" definition.

Application of the Fleuti Doctrine in Other Contexts

The exception clause of section 101(a)(13), which the Supreme Court interpreted in Fleuti, expressly pertains only to lawful permanent resident aliens.\textsuperscript{182} Nevertheless, courts have discussed Fleuti in cases where the alien does not have lawful permanent resident status.

A difficult question concerning the applicability of Fleuti arises when an alien has unlawfully secured his permanent resident status. Courts which have considered this issue agree that Fleuti should be applied to the departure and return of all aliens who have been granted permanent resident status.\textsuperscript{183} The proper forum for adjudicating the lawfulness of the alien's original admission is a deportation hearing; the alien cannot be excluded on the basis of the questioned original "entry" when he makes an innocent, casual, and brief

\textsuperscript{187}. See Heitland v. INS, 551 F.2d 495, 500-04 (2d Cir.), cert. denied, 434 U.S. 819 (1977); Barragan-Sanchez v. Rosenberg, 471 F.2d 758, 760-61 (9th Cir. 1972); Git Foo Wong v. INS, 358 F.2d 151, 152-54 (9th Cir. 1966); In re Salazar, 17 I. & N. Dec. 167, 169 (1979).

\textsuperscript{188}. Kamheangpatiyooth v. INS, 597 F.2d 1253, 1257-58 (9th Cir. 1979).

\textsuperscript{189}. Id. Accord Sida v. INS, 665 F.2d 851 (9th Cir. 1981); deGallardo v. INS, 624 F.2d 85 (9th Cir. 1980); In re Herrera, I.D. No. 2853 (BIA 1981).

\textsuperscript{190}. Fidalgo-Velez v. INS, 697 F.2d 1026 (11th Cir. 1983). The court reasoned that Congress intended the words "continuous physical presence" to be literally interpreted because the word "presence" rather than "residence" was used in the statute. Id. at 1029.

\textsuperscript{191}. Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), cert. granted, 103 S. Ct. 291 (1982).

\textsuperscript{192}. See supra text accompanying note 32.

\textsuperscript{193}. Maldonado-Sandoval v. INS, 518 F.2d 278, 281 (9th Cir. 1975); In re Rangel, 15 I. & N. Dec. 789, 790-92 (1976).
excursion outside the United States.\textsuperscript{194}

Most courts have held that \textit{Fleuti} is not applicable in the case of an alien who has never been granted permanent resident status.\textsuperscript{195} However, at least one court has discussed \textit{Fleuti} in connection with the claims of an alien who was admittedly present in the United States illegally.\textsuperscript{196} That court determined that \textit{Fleuti} provided no relief to the alien, not because application of \textit{Fleuti} was improper, but because the alien's departure had not been innocent, brief, or casual. The outcome of the case was therefore the same as if \textit{Fleuti} had not been applied. Nevertheless, because \textit{Fleuti} and the statutory exception pertain only to lawful permanent resident aliens, this discussion by the court seems inappropriate and could lead to further confusion of the \textit{Fleuti} doctrine.

\textbf{The Exception to the Exception—Departure Due to Legal Process}

The last clause of the statutory definition of "entry" indicates that a lawful permanent resident alien whose departure from the United States was due to deportation, extradition or other legal process is not entitled to the benefit of the unintentional/involuntary exception to the definition of "entry."\textsuperscript{197} Because this exception is not available to such an alien, the benefits of \textit{Fleuti} are also not available to him.\textsuperscript{198} When an alien crosses into a foreign country, either voluntarily or involuntarily, because of legal proceedings against him there, his subsequent return to the United States is an "entry," whether he is a lawful permanent resident alien or not.

\begin{footnotes}
\item[194] Id.
\item[197] See supra text accompanying note 32.
\item[198] In \textit{In re} Caudillo-Villalobos, 11 I. & N. Dec. 15 (1965), \textit{aff'd sub nom.} Caudillo-Villalobos V. INS, 361 F.2d 329 (5th Cir. 1966), the Board held that an alien's weekly trips to Mexico to sign a bond book in the office of a court clerk while his appeal from a criminal conviction there was pending resulted in an "entry" each time he returned to the United States. \textit{Id.} at 20. If his departures had not been occasioned by legal process in Mexico, his returns might not have been considered "entries" under \textit{Fleuti}, despite the frequency of his trips. Accord \textit{In re} Acosta, 14 I. & N. Dec. 666 (1974). In \textit{In re} Wood, 12 I. & N. Dec. 170 (1967), the Board found that an alien who twice voluntarily appeared in a Canadian court to answer criminal charges was held to the consequences of an "entry" upon each of his returns to the United States. The Board in that case, however, did not refer to the statutory provision relating to legal process. Instead, it reached its conclusions by applying the \textit{Fleuti} test and determining that the alien's departures were not innocent, casual, and brief excursions. Nevertheless, the results were the same as if the legal process language had been applied.
\end{footnotes}
The issue of "entry" in immigration law is multifaceted. Its resolution determines an alien's rights and liabilities in numerous contexts. The seemingly straightforward language of the statutory definition of "entry" has been construed to mean much more than the words facially might suggest. This is particularly true regarding the exception in the definition pertaining to unintentional and involuntary departures by lawful permanent resident aliens. The evolution of the current judicial interpretation of the statute has followed a path described by a commentator nearly forty years ago.

Progress in statutory interpretation is from language to fact. The courts' first tendency is to look at the barren word and to define it unimaginatively; as the statute is used more and more (and perhaps as experience demonstrates that hard cases are made by the bad law of the early interpretation) the courts look less at the barren word and more at the facts—the milieu in which the statute is to be applied. This development is apparent in the courts' handling of the word "entry" in the federal immigration law.

This Comment has set forth the current state of the law on the issue of "entry." As with every significant legal issue, though, one must question the validity of distinctions which are based on a determination such as "entry." For example, an alien who circumvents immigration laws and "enters" the country illegally is given greater procedural rights than an alien who applies for admission through legal channels and is paroled into the country pending determination of his right to "enter." It might appear that this system rewards the illegal entrant and penalizes the non-entrant applicant. But it also appears that, in many cases, the entrant has more to lose than the non-entrant if he is ordered to leave the country. The substantive consequences of "entry" may outweigh the procedural advantages available to the entrant. When viewed this way, the "entry" distinction seems to have some validity.

Other difficult questions arise regarding "re-entry" of lawful permanent resident aliens. Should courts even consider the "entry" issue except in cases dealing with original "entries"? Should a lawful permanent resident alien be deportable simply because he has left the country and returned? The activity which provides the underlying basis for deportation is often present whether he leaves the United States or not; yet, only if he "re-enters" upon his return may he be deported. Perhaps the law is intended to allow us to expel at least some aliens considered undesirable even though we have no basis for deporting others who are equally undesirable. But should the decisive factor be "entry" or should it be the alien's undesirable activity?

These and other difficult questions may be worthy of consideration

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in any case where the issue of "entry" arises. Perhaps with the growing concern about our immigration laws, Congress and the courts will re-examine the substantive basis for the technical rules which have been developed to determine "entry" and an alien's resulting rights and liabilities.

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