

CHAPTER 3 ADMISSION AND REMOVAL

I. LAWFUL ADMISSION AS THE DEFINING CONCEPT

A. *Lawful Admission, Not Entry, is the Defining Concept*—The traditional distinction between exclusion and deportation historically turned upon the concept of entry into the United States. This distinction became far less important with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The current law struck the definition of entry and replaced it with a definition for admission. Admission is now defined as the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” INA §101(a)(13)(A). The traditional test for entry—requiring (1) physical presence (a crossing into the territorial limits of the U.S.); (2) either (a) an inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest inspection point, and (3) freedom from restraint—is of limited importance because it has been replaced by a statutory distinction drawn between people who are lawfully admitted into the U.S. and all other people. However, for cases that arose prior to Apr. 1, 1997, this definition, adopted by the BIA remains. *Matter of Patel*, 20 I&N Dec. 368, 370 (BIA 1991); *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 854–55 (9th Cir. 2004) [person paroled and released was not free from restraint because he was in exclusion proceedings the entire time and therefore did not enter the U.S.]; *But see Matter of Sanchez*, 17 I&N Dec. 218, 220 (BIA 1980).

Persons who are not lawfully admitted and entered without inspection are deemed to be inadmissible as if they had been detained at the border. INA §212(a)(6)(A)(i). 8 C.F.R. §235.1(d)(2) [an alien “present in the U.S. who has not been admitted or paroled, or an alien who seeks entry at other than an open, designated port of entry ... is subject to the provisions of INA §212(a)”.]. Thus, the entry doctrine which spawned substantial litigation over when and under what circumstances a person entered the U.S., *see, e.g., Matter of Z*, 20 I&N Dec. 707 (BIA 1993); *Matter of Patel*, 20 I&N Dec. 368 (BIA 1991); *Matter of Pierre*, 14 I&N Dec. 467 (BIA 1973); *Sidhu v. Ashcroft*, 368 F.3d 1160 (9th Cir. 2004); *Yang v. Maugans*, 68 F.3d 1540 (3d Cir. 1995); *Zhang v. Slattery*, 55 F.3d 732, 756 (2d Cir. 1995), *cert. denied*, *Xin-Chang Zhang v. Slattery*, 516 U.S. 1176 (1996), is now far less significant for cases initiated after Apr. 1, 1997. However, even the definition of admission requires a “lawful entry,” so entry remains an aspect of admission. And notwithstanding the determination that persons who are EWI are subject to inadmissibility, they are still considered to have made an “entry” for other purposes. *Heng Meng Lin v. Ashcroft*, 247 F.Supp.2d 679, 683–85 (E.D. Pa. 2003) [for purposes of due process right of release under *Zadvydas* and application of Service regulation 8 C.F.R. §241.13, person who entered EWI has entered and is entitled to due process notwithstanding treatment as an inadmissible person].

Because a person who enters without inspection (EWI) is now treated legally as an applicant for admission under INA §235(a)(1), 8 U.S.C. §1225(a)(1), who is inadmissible under INA §212(a)(6)(A)(i), 8 U.S.C. §1182(a)(6)(A)(i), s/he qualifies for parole into the U.S. under 8 U.S.C. §1182(d)(5)(A) even if s/he does not meet the definition of an “arriving alien” under 8 C.F.R. §1.1(q). Memo, Virtue, G.C. to Field (HQCOU 120/17-P) (Aug. 21, 1998), *reprinted in* 76, No. 26 *Interpreter Releases* 1067–70 (July 12, 1999).

B. *Parole Is Not an Admission*—Historically, the parole of a person at the border or the parole of a person out of detention is not an admission into the U.S. *Leng May Ma v. Barber*, 357 U.S. 185 (1958); INA §212(d)(5), 8 U.S.C. §1182(d)(5). The Act specifically determines that a person granted parole, like a crewmember given permission to land temporarily, is not deemed to be admitted. INA §101(a)(13)(B). *Ibragimov v. Gonzales*, 476 F.3d 125, 132–38 (2d Cir. 2007) [an adjustment applicant

reentering on an advance parole is an arriving alien under 8 C.F.R. §1.1(q) and if his adjustment application is denied he remains a parolee and does not revert to a person admitted as an overstayer].

C. Applicants for Admission—The question of admission prior to IIRIRA also turned on whether the person was an applicant for admission into the U.S. If the person was not an applicant for admission s/he could not be placed in an exclusion proceeding. *Matter of Badalamenti*, 19 I&N Dec. 623 (BIA 1988) [person extradited to U.S. and paroled until trial not applicant for admission]; *Schuldreich v. INS*, ___ F.Supp. ___, No. B-93-93 (FBV) (S.D. Tex. Aug. 9, 1993), reported in 70, No. 45 *Interpreter Releases* 1562–64 (Nov. 22, 1993) [same]. Similarly, a person involuntarily removed from the U.S. (other than through deportation) could not be considered to make a new admission upon his or her return. *Delgadillo v. Carmichael*, 332 U.S. 388, 390–91 (1947) [where ship torpedoed and person taken to Cuba to recuperate his return is not a new entry]. However, INA §235(a)(1), 8 U.S.C. §1225(a)(1), provides that a person “present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of the Act “an applicant for admission.” See also 8 C.F.R. §235.1(f)(3); 8 C.F.R. §1.1(q). The legacy INS has taken the position that anyone brought to the U.S. is an applicant for admission regardless of intent and that *Matter of Badalamenti* is no longer good law in light of INA §235(a)(1). Memo, Virtue, GC to Cronin, Asst. Comm. Inspections (HQCOU 70/6.2.17-P), reprinted in 76 *Interpreter Releases* 471, 474 (Mar. 22, 1999). The BIA has also held that someone who lawfully entered the U.S. but wishes to leave may be held for removal proceedings. *Matter of Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999) [person seeking to leave U.S. within 24 hours of lawful entry held for removal proceeding for 4 years on grounds that Secretary of State determined his presence would have serious foreign policy consequences].

D. No Departure Means No New Admission—The question of admission is also related to whether a person has “departed” the U.S. A person who leaves the U.S. but does not enter another country does not “enter” the U.S. upon his return. *Matter of T*, 6 I&N Dec. 638 (BIA 1955). Thus, a crew member, for example, would not be deemed to depart the U.S. simply by sailing out of U.S. waters if s/he does not enter a foreign nation. Letter, Cronin, Asst. Comm. Inspections (CO 235-C) (Feb. 7, 1992), reprinted in 69 No. 12 *Interpreter Releases* 384, 399 (Mar. 30, 1992). Similarly, a person who leaves the U.S. and is denied admission to Mexico at the border is deemed not to have departed the U.S. Memo, Puleo, Acting Exec. Assoc. Comm. (HQ 245-C) (Nov. 15, 1993), reprinted in 13 *AILA Monthly Mailing* 35–37 (Jan. 1994). See also *Handa v. Crawford*, 401 F.3d 1129 (9th Cir. 2005) [where person on visa waiver program was turned away at Canadian border, his drive into Canada to go around Canadian flagpole did not constitute a departure from the U.S. and, therefore, he was not an applicant for admission upon return]. But see *Matter of R-D-*, 24 I&N Dec. 221 (BIA 2007) [Guinean who left the U.S., applied for asylum, stayed in Canada for several years and then was denied departed the U.S. notwithstanding Reciprocal Agreement with Canada to return individuals to the U.S.]

E. The Constitutional Question—The entry doctrine fiction has always been the basis for determining when and under what circumstances persons are accorded due process in proceedings. Although IIRIRA ended the traditional distinction between exclusion and deportation hearings *per se* and replaced them with removal hearings, the entry doctrine may have continuing vitality in regard to whether full constitutional rights are given to someone if they are in the U.S. even if they were not admitted. *Clark v. Martinez*, 543 U.S. 371 (2005) [avoiding constitutional question regarding the indefinite detention of inadmissible aliens and applying *Zadvydas* 6-month limitation on detention post-removal to inadmissible Cuban parolees as a statutory matter]. To the extent the distinction between inadmissible and deportable persons has continuing vitality the following discussion concerning distinctions drawn about entry has been retained.

F. Entry Defined—Immigration decisions draw numerous distinctions concerning when and under what circumstances a person has made an entry into the U.S. For example, an alien who escaped from detention while awaiting an exclusion hearing did not make an entry into the U.S. *Matter of Lin*, 18 I&N Dec. 219 (BIA 1982). An alien in transit without a visa (TWOV) has not entered the U.S. *U.S. v. Kavazanjian*, 623 F.2d 730 (1st Cir. 1980); *U.S. v. Esperdy*, 210 F.Supp. 786 (S.D.N.Y. 1962). An alien who was placed in carrier custody and failed to appear for an INS interview to determine admissibility has not made an entry. *Vitale v. INS*, 463 F.2d 579 (7th Cir. 1972). An alien under surveillance

before he enters may bar a claim to entry. *Zhang v. Slattery*, *supra* at 755 [continuous surveillance by INS can be sufficient to place alien under affirmative restraint].

An LPR who passed primary immigration inspection but was deferred for a customs inspection thereby never leaving the “customs enclosure” did not make an entry because he was not free from restraint. *Correa v. Thornburgh*, 901 F.2d 1166, 1171–72 (2d Cir. 1990); *Matter of Patel*, 20 I&N Dec. 368 (BIA 1991) [freedom from restraint need not be by INS officers]; *Zhang v. Slattery*, *supra* [same].

However, a detained stowaway who escapes while awaiting removal, *Matter of A-*, 9 I&N Dec. 356 (BIA 1961), or an alien who escapes after being refused admission, *Matter of Ching and Chen*, 19 I&N Dec. 203 (BIA 1984), or a person who comes ashore on land within federal jurisdiction but for reasons unrelated to immigration processing, *Matter of Z*, *supra*, has made an entry into the U.S.

The question of entry may often turn on whether the applicant is free from restraint. Eluding INS for a brief period of time after landing does not necessarily mean the applicant is free from restraint. *Yang v. Maugans*, 68 F.3d 1540, 1550 (3d Cir. 1995) [applicants who landed on beach and stayed there while it was teeming with law enforcement officers were not free from restraint].

An intention to evade inspection need not be established through the person’s own words. It may be established through documentary evidence and the facts and circumstances of entry, even where INS provides rebuttal testimony. *Nyirenda v. INS*, 279 F.3d 620 (8th Cir. 2002) [evidence indicated person intended to evade inspection and her response was not credible]; *Matter of Z*, *supra*; *Zhang v. Slattery*, *supra* [same].

While the INS may establish that a person was not free from restraint because INS was constructively surveilling him or he was otherwise under constructive restraint, such restraint does not arise where a person makes a landing and is at liberty for some period of time. *Nyirenda v. INS*, 279 F.3d 620 (8th Cir. 2002) [persons free from restraint where they were driving out of site of INS officials while traveling on a highway for approx. 2 miles in U.S.]; *Matter of Z*, *supra*.

G. Territorial Waters and Admission—The question of admission also turns in part on crossing into U.S. territory. In 1988, President Reagan issued a proclamation extending U.S. territorial waters to 12 miles. Proclamation 5928, 54 Fed. Reg. 777 (Jan. 9, 1989). This 12-mile limit has been incorporated in DHS regulations governing the external boundary for enforcement purposes. 8 C.F.R. §287.1(a)(1). This is consistent with U.S. obligations under the U.N. Convention on the Territorial Sea and the Contiguous Zone, Art. 24 (Apr. 29, 1958), 15 U.S.T. 1606, 1612. However, crossing into territorial waters may not be sufficient for an entry. *Yang v. Maugans*, 68 F.3d 1540, 1547–49 (3d Cir. 1995) [INA definition of U.S. does not include territorial waters]; *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995), *cert. denied*, *Xin-Chang Zhang v. Slattery*, 516 U.S. 1176 (1996); *Chen Zhou Chih v. Carroll*, 48 F.3d 1331 (4th Cir. 1995); *Rodriguez v. Ridge*, 310 F.Supp.2d 1242, 1245–46 (S.D. Fla. 2004), [crossing into territorial waters is not an admission into U.S. unless government brings person to U.S.]; *Matter of G-*, 20 I&N Dec. 764, 770 n.5 (BIA 1993) [BIA never held that crossing into territorial waters is entry]; *Matter of Cenatice*, 16 I&N Dec. 163 (BIA 1977); Legal Opinion, Dellinger, Acting Asst. Atty. General, Memoranda on Immigration Consequences of Undocumented Aliens’ Arrival in United States Territorial Waters (Oct. 13, 1993). *But see Lazarescu v. U.S.*, 199 F.2d 898, 900–01 (4th Cir. 1952) [entry into port and harbor of Baltimore is entry]; *Chung v. Reno*, 886 F.Supp. 1172 (M.D. Pa. 1995) [extensive discussion of the issue], *rev’d sub nom. Yang v. Maugans*, 68 F.3d 1540 (3d Cir. 1995).

H. Admission and Adjustment of Status—The question of admission also arises in the context of an adjustment application. An AOS is not deemed an entry (even though the grounds of inadmissibility are applicable), *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992); *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984). The plain language of INA §101(a)(13)(A) provides that admission requires a “lawful entry...into the United States after inspection and authorization by an immigration officer.” Nevertheless, the BIA has held that adjustment is an admission. *Matter of Rodarte*, 23 I&N Dec. 905, 908 (BIA 2006) [the 10-year bar provision under INA §212(a)(9)(B)(i)(II) applies to adjustment of status because “the term ‘admission’ generally refers to adjustment of status within the United States as well as lawful entry at the border”]; *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999). *But see Martinez v. Mukasey*, 519 F.3d 532, 542–45 (5th Cir. 2008) [under the first prong of *Chevron* and under longstanding principles construing statutes in favor of persons facing removal, the court rejected *Matter of Rosas* in interpreting the exclusion provision of INA §212(h) and concluded that the term “admitted” as used in INA §212(h) does not bar LPRs who were convicted of aggravated felonies from obtaining relief if they were adjusted]; *Abdelqadar v. Gonzales*, 413 F.3d 668, 672–74 (7th Cir. 2005) [questioning and

rejecting *Matter of Rosas* in the context of a commission of a crime of moral turpitude under §1227(a)(2)(A)(i) because the 5 years is correctly interpreted to be within 5 years of admission and not 5 years of adjustment]; *Aremu v. DHS*, 450 F.3d 578 (4th Cir. 2006) [same; reversing *Matter of Shanu*, 23 I&N Dec. 754, 756–59 (BIA 2005) and finding the plain language of §101(a)(13)(A) is contrary to BIA's interpretation because an adjustment clearly is not an admission when the person's original entry was lawful]; *Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007) [5 years is not measured from AOS for purposes of a CIMT committed within 5 years of admission, because AOS does not constitute an admission for purposes of calculating the time period]; *Shivaraman v. Ashcroft*, 360 F.3d 1142, 1146 (9th Cir. 2004). It may also arise in the context of relief. *Gomes v. Ashcroft*, 311 F.3d 43, 45–46 (1st Cir. 2002) [the term “admission” in IMMACT90 §511(b), which sets the date for the bar to INA §212(c) relief for a person who has been imprisoned for 5 years or more, applies not only to the person's original entry into the U.S., but also to the date of the application for INA §212(c) relief].

I. Admission Flexibly Applied in Other Contexts—Notwithstanding the statutory definition of admission under §101(a)(13)(A) as requiring an inspection, the courts and the BIA have interpreted the word “admitted” in other contexts to include persons already in the United States. In *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1015–19 (9th Cir. 2006) the court determined that “admitted in any status” for purposes of cancellation for LPRs included persons who registered in the U.S. for family unity benefits despite the lack of inspection at the border. Similarly in *Matter of Rosas*, 22 I&N Dec. 616, 623 (BIA 1999) the Board held that a person who entered EWI was still admitted when he attained LPR status.

II. ADMISSION AND LAWFUL PERMANENT RESIDENTS

A. Generally—Traditionally, a lawful permanent resident was not deemed to make a new admission into the U.S. upon his or her return if the trip was “innocent, casual and brief” and not meant to be “meaningfully interruptive” of the LPR's status. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). The distinction is significant for an LPR who would not be subject to removal from the U.S. but who might be inadmissible if his or her presence at the border was considered a request for a new admission into the U.S. For example, in *Fleuti*, a homosexual LPR would have been inadmissible into the U.S. if his return was considered a request for a new admission under former INA §212(a)(4). However, the Court did not treat *Fleuti*'s return as a request to be readmitted. Rather, it treated him as if he had never left the U.S. Thus, his homosexuality could not result in his removal from the U.S. because homosexuality, although at the time a basis for inadmissibility, was not a basis for removal. There have been numerous cases defining “brief, casual and innocent,” for purposes of determining whether the LPR should be treated as making a new admission. See, e.g., *Selimi v. INS*, 312 F.3d 854, 859–60 (7th Cir. 2002) [where LPR was involved in smuggling his wife, children, and cousin it was not an innocent trip and the benefits of *Fleuti* are inapplicable]; *Carbajal-Gonzalez v. INS*, 78 F.3d 194 (5th Cir. 1996) [brief trip to Mexico for party with wife and student was innocent trip where student did not have proper documents]; *Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995) [trip for 8 days to obtain a visa did not interrupt stay in suspension case]; *Biggs v. INS*, 55 F.3d 1398 (9th Cir. 1995) [obtaining fraudulent residency was not an innocent trip under *Fleuti*]; *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1090–94 (7th Cir. 1994) [EWI is separate charge and *Fleuti* inapplicable]; *Leal-Rodriguez v. INS*, 990 F.2d 939, 943–48 (7th Cir. 1993) [EWI is meaningfully interruptive of status]; *Molina v. Sewell*, 983 F.2d 676, 678 (5th Cir. 1993) [temporary departure of LPR during deportation proceedings is not meaningfully interruptive of status]; *Hernandez-Luis v. INS*, 869 F.2d 496 (9th Cir. 1989) [voluntary departure is meaningfully interruptive of status]; *Jubilado v. INS*, 819 F.2d 210 (9th Cir. 1987) [3-month trip with family is not meaningfully interruptive of status]; *DeOliviera v. INS*, 873 F.Supp. 338 (C.D. Cal. 1994) [4 months out due to airline strike and pregnancy was not meaningfully interruptive of status]; *Hamaya v. McElroy*, 797 F.Supp. 186, 188 (E.D.N.Y. 1992) [10-month trip not brief trip].

Congress has now defined when an LPR will be regarded as seeking a new admission. INA §101(a)(13)(C). An LPR will not be regarded as seeking a new admission unless: (1) s/he abandoned or relinquished her LPR status; (2) s/he has been absent from the U.S. for a continuous period in excess of 180 days; (3) s/he has engaged in illegal activity after having departed the U.S.; (4) s/he has departed from the U.S. while under legal process seeking removal of the LPR from the U.S., including removal proceedings and extradition proceedings; (5) s/he has committed a criminal offense under INA §212(a)(2), unless s/he was granted INA §212(h) or INA §240A(a) (cancellation of removal) relief; or (6) s/he is attempting to enter EWI or has not been admitted. The question of whether *Fleuti*

has now been overturned or modified by the enactment of INA §101(a)(13) and may no longer be relied upon has been addressed in a number of cases. *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1997) [finding in detention context *Fleuti* no longer requires the admission of an LPR whose trip was brief, casual and innocent but who had a conviction that would bar him under INA §212(a)(2)]; *De Vega v. Gonzales*, 503 F.3d 45, 48–49 (1st Cir. 2007) [the elements of the *Fleuti* doctrine are irrelevant to the legal determination under INA §101(a)(13)(C)]; *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007) [under *Chevron* deference following *Matter of Collado-Munoz*, the court determined that IIRIRA’s passage of INA §101(a)(13)(C) abrogated the *Fleuti* doctrine]; *Malagon De Fuentes v. Gonzales*, 462 F.3d 498, 501–05 (5th Cir. 2006) [IIRIRA superseded the *Fleuti* doctrine and the decision cannot be read to create a constitutional right]; *Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003) [determining that Congress did abolish the *Fleuti* doctrine in the passage of INA §101(a)(13)(C) for certain returning LPRs, and upholding *Matter of Collado-Munoz* on *Chevron* deference grounds]; *Ferraras v. Ashcroft*, 160 F.Supp.2d 617, 623 (S.D.N.Y. 2001) [treating returning LPR as arriving alien for detention purposes is constitutional post-*Zadvydas*].

Whether INA §101(a)(13)(C) abrogates *Fleuti*, it may not be applied retroactively to persons who were convicted or engaged in acts prior to IIRIRA that now affect their admissibility. *Camins v. Gonzales*, 500 F.3d 872, 880–85 (9th Cir. 2007) [INA §101(a)(13)(C) may not be applied retroactively to guilty pleas entered prior to its passage under IIRIRA]; *Olatunji v. Ashcroft*, 387 F.3d 383, 388–96 (4th Cir. 2004) [finding that “reliance, in any form, is irrelevant to the retroactivity inquiry” and holding that IIRIRA’s change in the *Fleuti* doctrine could not be retroactively applied to a person who pled guilty prior to its enactment]. See also generally *Falek v. Gonzales*, 475 F.3d 285 (5th Cir. 2007) [failure to raise retroactivity of INA §101(a)(13)(C) before BIA barred federal review].

In regard to a returning LPR, DHS has the burden of proving inadmissibility. *Landon v. Plasencia*, 459 U.S. 21 (1982) [returning resident entitled to due process protections]; *Molina v. Sewell*, 983 F.3d 676, 678 (5th Cir. 1993); *Matter of Sosa*, 15 I&N Dec. 572 (BIA 1976). Post-IIRIRA and the passage of INA §101(a)(13)(C), however, there is a question as to whether the government must prove by “clear, convincing and unequivocal” evidence the application of INA §101(a)(13)(C). *Sandoval-Loffredo v. Gonzales*, 414 F.3d 892 (8th Cir. 2005) [addressing but not deciding who has the burden; IJ found that the government established by clear, convincing, and unequivocal evidence that the LPR engaged in unlawful activity under §101(a)(13)(C)(ii) in facilitating his brother’s illegal entry]; *Molina v. Sewell*, 983 F.2d 676, 678 (5th Cir. 1993) [applicant bears the burden to prove he comes within the statutory definition of lawful admission (formerly the *Fleuti* exception)].

The application of INA §101(a)(13)(C)(v) may turn on whether the BIA makes a finding that a person committed a criminal act. *Toro-Romero v. Ashcroft*, 382 F.3d 930 (9th Cir. 2004) [whether a returning LPR can be found inadmissible for making a false claim to citizenship will turn on whether he committed a CIMT and is therefore inadmissible and subject to §101(a)(13)(C). Where BIA failed to make that finding, the court reversed].

Notwithstanding Congress’s efforts to restrict *Fleuti*, a question remains whether *Fleuti* may be applied to persons who are not LPRs. *Aquilera-Medina v. INS*, 137 F.3d 1401 (9th Cir. 1998) [applying *Fleuti* to SAW temporary residents]; *Joshi v. INS*, 720 F.2d 799 (4th Cir. 1983); *Patel v. Landon*, 739 F.2d 1455 (9th Cir. 1984); *Siverts v. Craig*, 602 F.Supp. 50 (D. Hawaii 1985) [where returning to U.S. after advance parole (I-512) person entitled to deportation hearing]; *Flores-Salgado v. Caplinger*, 872 F.Supp. 1521 (E.D. La. 1995) [*Fleuti* applicable to conditional resident even if person traveled on I-512]; *Campos v. Smith*, 791 F.Supp. 262 (W.D. Wa. 1991) [applying *Fleuti* to legalization applicant]. DHS regulations may not bar a registry applicant who received advance parole from asserting a right to deportation proceedings. *Navarro-Aispura v. INS*, 53 F.3d 233 (9th Cir. 1995). The BIA, however, has declined to follow *Joshi*, *supra*, limiting the *Fleuti* doctrine pre-IIRIRA to LPRs. *Matter of Torres*, 19 I&N Dec. 371 (BIA 1986) [alien paroled on I-512 for adjustment in exclusion not deportation proceedings; adjustment determination independent of excludable status]; *Assa’ad v. U.S. Att’y General*, 332 F.3d 1321, 1332 (11th Cir. 2003) [limiting *Fleuti* to LPRs and finding that denied legalization applicant traveling on advance parole was properly placed in exclusion proceeding]; and INS regulations were subsequently changed, thereby nullifying *Joshi*. 8 C.F.R. §245.2(a)(4)(ii). See also *Ibragimov v. Gonzales*, 476 F.3d 125, 132–38 & n.18 (2d Cir. 2007) [finding *Joshi* and *Patel* no longer good law and determining that adjustment applicant reentering on an advance parole is an arriving alien under 8 C.F.R. §1.1(q)]; *Tapia v. Ashcroft*, 351 F.3d 795, 798–99 (7th Cir. 2003) [*Fleuti* doctrine cannot be relied upon post-IIRIRA to assist respondent who claims he had 7 years of physical presence that

were not interrupted because his 6½-month trip abroad was brief, casual and innocent]; *Assa'ad*, 332 F.3d 1321 (11th Cir. 2003); *Balogun v. U.S. Att'y Gen.*, 304 F.3d 1303(11th Cir. 2002) [no constitutionally protected right to be advised of consequences of accepting advance parole]; *Dimenski v. INS*, 275 F.3d 574 (7th Cir. 2001) [adjustment applicant who received advance parole properly in exclusion proceeding and there is no requirement that the advance parole form warn person of consequences]; *Mendoza v. INS*, 16 F.3d 335 (9th Cir. 1994); *Kasbati v. District Director*, 805 F.Supp. 619 (N.D. Ill. 1992); *Matter of S-O-S-*, 22 I&N Dec. 107 (BIA 1998) [describing law in 9th Cir. regarding advance parole]; *Matter of G-A-C-*, 22 I&N Dec. 83 (BIA 1998) [asylum applicant returning on advance parole properly in exclusion; distinguished *Navarro-Aispura*]; *Matter of Singh*, 21 I&N Dec. 427 (BIA 1996) [a class member in *CSS* who is a returning applicant for legalization under INA §245A may not terminate exclusion proceedings based on *Fleuti*]; *Matter of Chavez-Calderon*, 20 I&N Dec. 744 (BIA 1993) [*Fleuti* inapplicable to lawful temporary residents under INA §210].

III. GROUNDS FOR INADMISSIBILITY, INA §212(a), 8 U.S.C. §1182(a)— CLASSES OF PERSONS INELIGIBLE FOR VISAS AND ADMISSION

A. Health-Related Grounds—INA §212(a)(1), 8 U.S.C. §1182(a)(1); 22 C.F.R. §40.11; AFM at 23.3, 41.3

1. *Communicable Disease of Public Health Significance*—INA §212(a)(1)(A)(i), 8 U.S.C. §1182(a)(1)(A)(i); 42 C.F.R. §34.2(b); 9 FAM 40.11 N.6.
 - 1.a. An alien who is determined (in accordance with HHS regulations) to have a communicable disease of public health significance.
 - (1) HIV infection by statute is now considered a communicable disease of public health significance. Infectious tuberculosis is also listed by regulation. 42 C.F.R. §34.2(b); 9 FAM 40.11 N. 6. In *Haitian Centers Council v. Sale*, 817 F.Supp. 336 (E.D.N.Y. 1993), applicants for asylum who were HIV-infected successfully challenged their continued detention.
 - 1.b. Waiver Available—INA §212(g)(1), 8 U.S.C. §1182(g)(1). The AG may waive inadmissibility under INA §212(a)(1)(A)(i) if the alien is the spouse, unmarried son or daughter or the minor unmarried lawfully adopted child of a USC, LPR, or a person issued an immigrant visa, or the alien has a son or daughter who is a USC, LPR, or a person issued an IV. A VAWA self-petitioner is also covered. Service policy in regard to waiver explained in Memo, Al-einikoff, Exec. Assoc. Comm., HQ 212.3-P (Sept. 6, 1995), *reprinted in* 72 No. 38 *Interpreter Releases* 1347–54 (Oct. 2, 1995). The waiver procedure for IV cases for persons who are HIV-positive equally applies to K-3/K-4 and V-1/V-2 applicants. Memo, Yates, Assoc. Dir. Operations, USCIS, HQ 70/21.1.1, AD 04-05 (Nov. 2, 2004), *published on* AILA InfoNet at Doc. No. 04111862. DHS guidelines for waivers are at AFM at 41.3 and Memo, Williams, Ex. Assoc. Comm. Field Operations, HQ 70/21/1.1-P, AD 0103 (Oct. 17, 2002), *published on* AILA InfoNet at Doc. No. 03031763. For nonimmigrants, USCIS/DOS has granted blanket waivers for individuals who are HIV-positive to attend special conferences. *See e.g.*, Blanket Waiver for United Nations Special Session on HIV/AIDS, Cable, DOS, 08-State-048125 (May 6, 2008), *published on* AILA InfoNet at Doc. No. 08050831.
2. *Vaccinations*—INA §212(a)(1)(A)(ii), 8 U.S.C. §1182(a)(1)(A)(ii); 22 C.F.R. §40.11.
 - 2.a. A person who seeks an *immigrant visa* or *adjustment of status* and has failed to present documentation of having received vaccination against vaccino-preventable diseases (including, at least: mumps, measles, rubella, polio, tetanus and diphtheria, pertussis, influenza type R and hepatitis B, and any other vaccination recommended by the Advisory Committee for Immunization Practices (ACIP)) is inadmissible. The ACIP has also included varicella and pneumococcal. The section does *not* apply to NIVs. A K visa applicant is subject to an assessment of whether s/he has taken the proper vaccinations, but cannot be denied the visa for noncompliance because the requirement only applies to IVs. Nor are refugees, asylees, registry applicants, North American Indians born in Canada or children of returning residents required to comply with the requirements. Memo, Virtue, Acting Exec. Assoc. Comm. (Sept. 29, 1997), *reprinted in* 74 No. 42 *Interpreter Releases* 1682, 1687–90 (Nov. 3, 1997). Congress has also exempted internationally adopted children under 10. *See* PL 105-73. The Center for Disease Control has set forth technical instructions for the medical examinations.

CDC, *Addendum to the Technical Instruction for Medical Examination of Aliens in the United States*, April 1997, *reprinted in* 75 No. 13 *Interpreter Releases* 472, 481 (Apr. 6, 1998). The CDC information is also available online at www.cdc.gov/ncidod/dq/technica.htm. These instructions are changed from time to time. *See e.g.*, 2007 “CDC Immigration Requirements: Technical Instructions for Vaccination,” *reprinted in* 85 No. 10 *Interpreter Releases* 661, 691 and 723–41 (Mar. 3, 2008).

- 2.b. Waiver—INA §212(g)(2), 8 U.S.C. §1182(g)(2). Waiver is available where: (1) person received vaccination but does not have documentation; (2) vaccination would not be medically appropriate; (3) regulations of AG do not require vaccination because of person’s religious beliefs or moral convictions. The legislative history provides for a broad interpretation of the waiver to include its use where the person is: (A) “unable to receive a safe dosage or vaccine in the country of nationality”; (B) “a child who is required to complete a series of vaccinations over a course of time and has not had a reasonable opportunity to complete that course”; or (C) is an active member of a religious faith that notifies the AG that such vaccination would contradict the fundamental tenets of the religion. H.R. Conf. Rep. 828, 104th Cong., 2d Sess. at 226 (1996). To qualify for a religious objection waiver, the applicant must show: (1) s/he is opposed to vaccinations in any form; (2) the objection is based on religious belief or moral conviction; and (3) the belief or conviction is sincere. Memo, Virtue, Acting Exec. Assoc. Comm. (Sept. 29, 1997), *reprinted in* 74 No. 42 *Interpreter Releases* 1682, 1687–90 (Nov. 3, 1997). The religious waiver may also be filed for an adopted child. Cable, DOS, (98-State-083590), *reprinted in* 75 No. 19 *Interpreter Releases* 700 (May 18, 1998). An applicant may also receive a waiver because the vaccine is not medically appropriate due to: (1) age; (2) contraindication; (3) insufficient time interval; (4) seasonality of vaccination (*e.g.*, flu shot); or (5) unavailability. Memo, Yates, Deputy Exe. Assoc. Comm. Immigration Services Division, HQADN 70/21.1.1 (June 25, 2002), *published on* AILA InfoNet at Doc. No. 02070240; Cable, Albright, Secy. of State, 97-State-071637 (Apr. 17, 1997), *reprinted in* 74 No. 17 *Interpreter Releases* 749–56 (May 5, 1997); Memo, Virtue, Acting Exec. Comm. Programs, INS, HQ 5015.12, 96 Act. 027 (Apr. 10, 1997), *reprinted in* 74 No. 15 *Interpreter Releases* 639, 660–63 (Apr. 21, 1997). USCIS has granted to consular officers the right to grant the waivers in IV cases. *Id.* The waiver is submitted on an I-601 form. DHS guidelines for waivers are at AFM at 41.3 and Memo, Williams, Ex. Assoc. Comm. Field Operations, HQ 70/21/1.1-P, AD 0103 (Oct. 17, 2002), *published on* AILA InfoNet at Doc. No. 03031763.
- 2.c. Refugees and asylees are not required to comply with the vaccination requirements because refugees are not admitted as immigrants and asylees are in the U.S. However, when refugees or asylees seek to adjust, they are subject to the vaccination requirements. They are also eligible for a broader waiver under INA §209(c) than the vaccination waiver. Memo, Bednarz, Acting Assoc. Comm. Adjudications (HQ 70/21.1.1, 96 Act 074) (July 30, 1998), *reprinted in* 75 No. 33 *Interpreter Releases* 1193, 1203–07 (Aug. 31, 1998). Refugees and asylees seeking waivers under INA §209(c) or the religious waiver under INA §212(g)(2)(C) shall file them on Form I-602.
3. *Physical or Mental Disorder*—INA §212(a)(1)(A)(iii), 8 U.S.C. §1182(a)(1)(A)(iii); 42 C.F.R. §§34.2(d)(2), (l)(2); (n), (p).
 - 3.a. An alien who is determined (in accordance with HHS regulations in consultation with the AG):
 - (1) To have a physical or mental disorder *and* behavior associated with the disorder that may pose, or has posed, a threat to the property, safety and welfare of the person or others; or
 - (2) Has had such disorder and associated behavior in the past *and* it is likely to recur or to lead to other harmful behavior.
 - (3) The presence of a physical or mental illness alone does not determine whether a person poses a significant risk, and where the mental shortcoming is due to ignorance or where the person is suffering from a condition attributable to remediable physical causes or of a temporary nature caused by toxin, medically prescribed drug, or disease, the medical examiner may not issue a class A notification. 42 C.F.R. §34.4(b).
 - (4) A history of institutionalization for a mental disorder, a criminal history such as assaults and domestic violence where alcohol or other psychoactive substance was a contributing factor,

other criminal arrests where there is a reasonable possibility of a mental disorder as a contributing factor, or DUI/DWI convictions and/or arrests under certain circumstances should require a mental status examination to determine admissibility. Memo, Yates, Assoc. Dir. Operations (Jan 16, 2004), *published on* AILA InfoNet at 04022362.

- (5) This section has been interpreted to include an episode of DWI or other alcohol related human behavior. 12 *AILA Monthly Mailing* 385 (May 1993) [denied IV because of DWI conviction]. Although an alcoholic is not ineligible to receive a visa unless there is harmful behavior associated with the disorder, DHS has recognized that “alcohol abuse/dependence resulting in alcohol-impaired driving may serve as the basis for a determination that an alien has mental disorder with associated harmful behavior” resulting in inadmissibility under this section. Memo, Yates, Assoc. Dir. Operations (Jan 16, 2004), *published on* AILA InfoNet at 04022362. DOS also requires that an IV applicant who has “a single drunk driving arrest or conviction within the last three calendar years or two or more drunk driving arrests or convictions in any time period” be referred to a panel physician for additional evaluation. 9 FAM 40.11 N8.3.
- 3.b. Waiver Available—INA §212(g)(3), 8 U.S.C. §1182(g)(3)—The AG, under such terms as he, in consultation with the HHS Secretary, may prescribe, may waive inadmissibility under this section. DHS guidelines for waivers are at AFM at 41.3 and Memo, Williams, Ex. Assoc. Comm. Field Operations, HQ 70/21/1.1-P, AD 0103 (Oct. 17, 2002), *published on* AILA InfoNet at Doc. No. 03031763.
4. *Persons determined to be drug abuser or addict* (in accordance with HHS regulations)—INA §212(a)(1)(A)(iv), 9 FAM 40.11 N9.; *Matter of T-*, 8 I&N Dec. 523 (BIA 1960); *Matter of K.C.B.*, 6 I&N Dec. 374 (BIA 1954). Drug abuse is defined as the nonmedical use of a substance listed in §202 of the Controlled Substances Act that has not necessarily resulted in physical or psychological dependence. 42 C.F.R. §34.2(g). However, it does not include the experimentation with a substance (e.g., single use of marijuana or amphetamines). Cable, DOS, 91-State-416180 (Dec. 24, 1991), *reprinted in* 69 No. 1 *Interpreter Releases* 5 (Jan. 6, 1992). 9 FAM 40.11 N. 9.1(c). A person is also not inadmissible as a drug addict or drug abuser if he is has not used a psychoactive substance within the last 3 years. 9 FAM 40.11 N.9.5. If it is not a controlled substance (e.g., alcohol), the waiting period is 2 years. *Id.* The CDC will issue an advisory opinion to DOS where the applicant disagrees with the medical decision. AILA-DOS Liaison Committee Minutes (DOS clarification) (May 24, 2006), *published on* AILA InfoNet at Doc. No. 06052460. Unlike §§212(a)(1)(A)(i) & (ii), drug abusers or addicts have no waiver available to them under this section.
5. Person or guardian who accompanies an inadmissible alien who is certified to be helpless due to infancy, sickness, or physical or mental disability, and whose protection or guardianship is determined to be required by the person—A medical examining officer may certify this. INA §212(a)(10)(B), 8 U.S.C. §1182(a)(10)(B); 22 C.F.R. §40.102.
6. *Appeal*—A person given a class A certification leading to inadmissibility may appeal to DHS whereupon a medical board is convened and the applicant may bring his own medical experts to testify. 42 C.F.R. §34.8(a)(2).
7. *Burden of Proof*—If a medical officer, civil surgeon or board of medical officers certifies under INA §232(b) that a person has a disease, illness or addiction which makes her inadmissible under INA §212(a)(1), the IJ’s decision shall be based solely on the certification. INA §240(c)(1)(B).
8. IMMACT90 substantially altered the former health-related grounds by eliminating as a ground of exclusion: mental retardation, *Matter of Azevedo*, 13 I&N Dec. 611 (Comm. 1970); insanity per se or one or more attacks of insanity per se, *Matter of W-*, 2 I&N Dec. 68 (BIA 1944); *Matter of M-*, 7 I&N Dec. 140 (BIA 1956); affliction with psychopathic personality, sexual deviation or mental defect, including homosexuality, *Boutilier v. INS*, 387 U.S. 118 (1967); *Matter of Hill*, 18 I&N Dec. 81 (BIA 1981), *rev’d*, *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983) [not excludable without Public Health Service determination]; *Matter of Longstaff*, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, *Longstaff v. INS*, 467 U.S. 1219 (1984) [PHS cannot thwart congressional definition]; and chronic alcoholism.

B. Economic Grounds

1. *Persons Likely to Become Public Charge*—INA §212(a)(4), 8 U.S.C. §1182(a)(4); 22 C.F.R. §40.41; 9 FAM 40.41 N1-13, PN 1-4; H.R. Conf. Rep. 104-828, 104th Cong., 2d Sess. 240–42. Prior case law has defined public charge as a person who “by reason of poverty, insanity, disease or disability would become a charge upon the public.” *Gegiow v. Uhl*, 239 U.S. 3 (1915). “Poverty” is defined by the annually updated poverty guidelines. In 2008 the poverty guidelines for the 48 contiguous United States and D.C. (excluding Alaska and Hawaii, which are higher), are as follows: for one person (\$10,400); 2 people (\$14,000); 3 people (\$17,600); 4 people (\$21,200); 5 people (\$24,800); 6 people (\$28,400); 7 people (\$32,000); and 8 people (\$35,600). For family units with more than 8 members, add \$3,600 for each additional member. 73 Fed. Reg. 3791–92 (Jan. 23, 2008). For more information about the poverty guidelines go to www.census.gov/hhes/www/poverty/poverty.html. For USCIS purposes, the guidelines become effective on the second full month following their release, which would be March following their release in January. Memo, Aytes, Acting Dir. Domestic Operations, USCIS HQRPM 70/21.1.13 at 15, 18 (June 27, 2006), published on AILA InfoNet at Doc. No. 06063013. To determine public charge, INS traditionally has applied a “totality of the circumstances” approach, which includes whether alien has received public assistance, his or her age, capacity to earn a living, health, family situation, work history, affidavits of support and physical and mental condition. *Matter of A-*, 19 I&N Dec. 867 (Comm. 1988) [unemployed woman who is young and has no physical or mental impediments that would affect her ability to earn a living is not a public charge]. See also *Matter of Vindman*, 16 I&N Dec. 131 (R.C. 1977). Under IIRIRA §531(a), Congress mandated that the following factors be taken into account in deciding public charge: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills. DOS has instructed consular officers to review HIV cases in light of the public charge provisions. Cable, DOS, No. 92-State-093280 (Mar. 25, 1992), reprinted in 69 No. 16 *Interpreter Releases* 516–17 (Apr. 27, 1992). DOS has also determined that “a properly filed, nonfraudulent I-864 (affidavit of support) shall normally be considered sufficient to overcome the §212(a)(4) requirements.” Cable, DOS (98-State-102426) (June 8, 1998), reprinted in 75 No. 24 *Interpreter Releases* 879 (June 29, 1998). However, DOS recognizes that public charge concerns may be appropriate even with a valid affidavit of support where there are identifiable personal characteristics of the applicant that would require considerable resources from either the sponsor or the public and the sponsor does not have such resources. These characteristics might include “chronic illness, physical or mental handicaps, extreme age or other serious conditions.” Cable, 98-State-102426, *supra* at 880. *Accord* USCIS, 71 Fed. Reg. 35732, 35737–38 (June 21, 2006). As a general rule receipt of public benefits by a family member is not attributable to the applicant absent a showing that it is the sole means of support for the family. See INS field guidance on public charge. 64 Fed. Reg. 28689–93 (May 26, 1999), reprinted in 76 No. 21 *Interpreter Releases* 843, 873–77 (May 28, 1999). Public charge is defined by DOS as “likely to become primarily dependent on the government for subsistence, as demonstrated by either (1) the receipt of public cash assistance for income maintenance or (2) institutionalization for long-term care at government expense.” 9 FAM 40.41 N1-2. However, DOS recognizes that the receipt of public cash assistance or institutionalization for long term care are only factors to be considered in the totality of the circumstances. Cable, Albright, DOS 99-State-095509 (May 24, 1999), published on AILA InfoNet at Doc. No. 99052491. Moreover, if a person has received public benefits, it is not the role of the consular officer to establish or address repayment in its assessment. *Id.* Public cash assistance is generally limited to SSI, Temporary Assistance for Need Families (TANF) and state General Assistance. The receipt of such things as Food Stamps, WIC, Medicaid, Children’s Health Insurance Program (CHIP), Head Start, public housing, and others does not automatically determine that someone is a public charge. Nor does the receipt of cash or noncash welfare programs that are received by a person’s children or other family members considered a public charge for the immigrant unless the cash welfare is the family’s only means of support. *A Quick Guide to Public Charge and Receipt of Public Benefits* (Oct. 18, 1999), reprinted in 76 No. 43 *Interpreter Releases* 1613, 1637–38 (Nov. 8, 1999). If a person seeks to demonstrate future employment to refute any inference of public charge, he may submit an offer of employment. The submission of an offer of employment must be sworn to and subscribed before a notary and must contain the signatory’s title. 22 C.F.R. §40.41(e).

1. a. Affidavit of Support (I-864)—8 C.F.R. §213a, 22 C.F.R. §40.41; AFM at 20.5; 71 Fed. Reg. 35732–57 (June 21, 2006); 62 Fed. Reg. 54346 (Oct. 20, 1997); Memo, Aytes, Acting Dir. Domestic Operations, USCIS HQRPM 70/21.1.13 (June 27, 2006), *published on* AILA InfoNet at Doc. No. 06063013. Each beneficiary, in order to obtain LPR status, must submit an affidavit of support (I-864) by a sponsor. The submission of customary affidavits of support (I-134) traditionally carried some weight in determining public charge, *Matter of Kohama*, 17 I&N Dec. 257 (A.C. 1978), but now the consular or DHS officer must, at a minimum, require the I-864 affidavits, when they are specified under INA §213A. The submission of a sufficient I-864 will generally overcome the public charge ground but not in every possible case. In a particular case there may be specific facts about the intending immigrant that warrant a finding of public charge under the factors specified in INA §212(a)(4)(B). 71 Fed. Reg. 35738 (June 21, 2006).
- (1) Effective Date for I-864—The provisions governing the affidavits of support apply beginning Dec. 19, 1997; but they shall not apply to persons who applied for IVs (*i.e.*, signed an OF-230 in front of consular officer) before Dec. 19, 1997. Cable, DOS, 97-State-238374 (Dec. 22, 1997), *reprinted in* 75 No. 1 *Interpreter Releases* 3, 7–8 (Jan. 5, 1998).
 - (2) The Sponsor for the I-864—8 C.F.R. §213a.2(b). The sponsor for the affidavit in family-based petitions must be the petitioning family member. This sponsorship requirement includes persons seeking residency as orphans (unless she would become a USC upon entry under INA §320) and adjustment after admission on a K visa. 8 C.F.R. §213a.2(a)(2)(i)(A). Where more than one petition has been filed, the sponsor must be the petitioner on the petition used for residency. 8 C.F.R. §213a.2(b)(1). The requirement that an I-864 be filed and that a sponsor for the I-864 be found also applies to employment-based cases, but only where it is a relative that files the immigrant visa (I-140) petition or where the relative has a “significant ownership interest,” in the entity that files the immigrant visa petition. A “relative” is defined as a husband, wife, father, mother, child, adult son or daughter, brother or sister. 8 C.F.R. §213a.1. A “significant ownership interest” means 5% or more. 8 C.F.R. §213a.1. However, if the relative who owns an interest in the company is not a USC or LPR, the affidavit is not required. 8 C.F.R. §213a.2(b)(2); Cable, DOS, 98-State-042068 (Mar. 12, 1998), *published on* AILA InfoNet at Doc. No. 98031291. An I-864 is also not required if the relative is a brother or sister who is not a USC. 8 C.F.R. §213a.2(a)(2)(i)(C). All sponsors must be 18 years of age, but if under 18 can cure the improper filing by signing the I-864 again on or after his 18th birthday before a decision on the intending immigrant’s IV or AOS. 71 Fed. Reg. 35732, 35734 (June 21, 2006)
 - (3) Affidavit of Support (I-864) Does Not Apply to Certain Cases—The specialized affidavit does not apply to all other employment cases. Similarly, the I-864 Affidavit of Support is not required in cases involving: (1) diversity immigrants; (2) special immigrants; (3) self-petitioning immigrants (widows/widowers, spouses/children subjected to battery or extreme cruelty, and certain children, spouses and grandparents under the USA PATRIOT Act); (3) Refugees and asylees adjusting status; (4) Registrants under INA §249; and (5) persons who have already earned or can be credited with 40 quarters of coverage pursuant to SSA regulations. Memo, Aytes, Acting Dir. Domestic Operations, USCIS HQRPM 70/21.1.13 (June 27, 2006) at p.5, *published on* AILA InfoNet at Doc. No. 06063013 (June 27, 2006); Memo, Cronin, Acting Assoc. Comm. Office of Program (70/23.1) (Mar. 7, 2000), *published on* AILA InfoNet at Doc. No. 00032704. An affidavit also need not be filed in a family-based petition where the beneficiary will be immediately eligible to become a USC under INA §320(a), because the affidavit would be futile as its validity is extinguished as soon as s/he becomes a USC. 8 C.F.R. §213a.2(a)(2)(ii)(E); Memo, Cronin, Acting Ex. Assoc. Comm. Field Operations, HQ PGM 50/10 (May 17, 2001), *published on* AILA InfoNet at Doc. No. 01060821; Cable, DOS, 01-State-105806 (June 16, 2001), *published on* AILA InfoNet at Doc. No. 01061691 [children adopted abroad in IR-3 category do not require an I-864 affidavit]. An affidavit is also not required for a child admitted as an LPR under INA §211(a) and 8 C.F.R. §211.1(b)(1) when returning with her LPR/USC parent. 8 C.F.R. §213a.2(a)(2)(ii)(D). Also, derivative