PRACTICE ADVISORY[1]
April 5, 2012

VARTELAS v. HOLDER: IMPLICATIONS FOR LPRs WHO TAKE BRIEF TRIPS ABROAD AND OTHER POTENTIAL FAVORABLE IMPACTS

INTRODUCTION

Before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) took effect on April 1, 1997, lawful permanent residents (LPRs) with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was brief, casual and innocent. *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). After IIRIRA, however, the Board of Immigration Appeals (BIA) determined that the new law eliminated this *Fleuti* exemption for LPRs who had committed a criminal offense that fell within the grounds of inadmissibility. *See Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998) (en banc) (interpreting INA § 101(a)(13)(C)(v), added by IIRIRA).

On March 28, in *Vartelas v. Holder*, the Supreme Court held that the *Fleuti* doctrine still applies to LPRs with pre-IIRIRA convictions who travel abroad. *See Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012).[2] The Court did not reach the question of the continued viability of the *Fleuti* doctrine for LPRs with post-IIRIRA convictions. Under its retroactivity jurisprudence, the Court found that the legal regime in force at the time of a person's pre-IIRIRA conviction governs. As a result of the Supreme Court's decision, Mr. Vartelas' removal proceedings should be terminated on remand. This decision directly impacts other LPRs with pre-IIRIRA convictions who have been placed, or are at risk of being placed, in removal proceedings after a brief trip abroad.

Beyond that context, the decision also provides support for arguments against retroactive application of other immigration provisions, such as the government's application of IIRIRA's repeal of § 212(c) relief to individuals with pre-IIRIRA *trial* convictions. In addition, the decision lends support for a broad reading of a criminal defense lawyer's duty under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

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[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

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[2] The citations to *Vartelas* used throughout this practice advisory (Op. at __) refer to the slip opinion, located at http://www.supremecourt.gov/opinions/11pdf/10-1211.pdf.

This advisory describes (1) the Court's decision in *Vartelas*; (2) its potential impact on LPRs who take brief trips abroad; (3) suggested steps that lawyers (or immigrants themselves) may take immediately in pending or already concluded removal proceedings involving such individuals; and (4) some of the other potential favorable impacts of the decision.

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I. THE SUPREME COURT'S DECISION IN *VARTELAS*

A. The *Vartelas* Holding: *Fleuti* Lives On for LPRs with Pre-IIRIRA Convictions Who Take Brief Trips Abroad

Mr. Vartelas, an LPR originally admitted to the United States as a student in 1979, pleaded guilty in 1994 to the offense of conspiring to make a counterfeit security. Under the legal regime in place at the time of his conviction, an LPR like Mr. Vartelas would not be charged with inadmissibility (then excludability) upon his return from a brief trip abroad. The immigration statute provided an exception for LPRs if their "departure to a foreign port or place . . . was not intended or reasonably to be expected by [them]…." INA § 101(a)(13) (1988 ed.). In 1963, the Supreme Court had interpreted this provision to mean that Congress did not intend to exclude long-time residents upon their return from "innocent, casual, and brief excursion[s] . . . outside this country's borders." *Fleuti*, 374 U.S. at 462.

In 1996, Congress enacted IIRIRA, which amended the immigration statute to provide that an LPR "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . has committed an offense identified in section 212(a)(2) [criminal inadmissibility grounds] . . .." INA § 101(a)(13)(C)(v) (added by IIRIRA, Pub. L. No. 104-208, § 301, 110 Stat. 3009, 575 (1996)). The BIA read this amendment as eliminating the *Fleuti* exception for an LPR who takes a brief, casual and innocent trip abroad. *See Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998) (en banc).

In January 2003, Mr. Vartelas returned from a week-long trip to Greece and an immigration officer determined he was "seeking an admission" and charged him with being inadmissible based on a "crime involving moral turpitude," namely, his 1994 conviction for conspiring to make a counterfeit security. The BIA and the United States Court of Appeals for the Second Circuit concluded that IIRIRA's new admission provision applied retroactively to Mr. Vartelas. The Second Circuit reasoned that Mr. Vartelas had not relied on the prior legal regime at the time he "committed" his offense. *See Vartelas v. Holder*, 620 F.3d 108, 118-20 (2d Cir. 2010). Significantly, the Second Circuit's decision conflicted with prior decisions from the Fourth and Ninth Circuits. *See Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004); *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007). The Supreme Court granted Mr. Vartelas' petition for certiorari to resolve the circuit split, and ultimately reversed the Second Circuit.

The Court began its analysis by noting the presumption against retroactive legislation, "under which courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity." Op. at 7 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 263 (1994)). Since the government conceded that there was no unambiguous directive, the Court proceeded to the question of whether application of IIRIRA to Mr. Vartelas "would have retroactive effect" that Congress did not authorize. Op. at 8 (citing *Landgraf*, 511 U.S. at 280).

The Court concluded that there was impermissible retroactive effect, finding that the application of INA § 101(a)(13)(C)(v) to Mr. Vartelas would attach "a new disability" to conduct completed well before the provision's enactment. Op. at 9. The Court stated:

> Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a "new disability." Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Id. Significantly, the Supreme Court expressly rejected the Second Circuit's conclusion that Mr. Vartelas could not demonstrate impermissible retroactive effect because he could not show reliance on prior law when he "committed" his offense. The Court stated:

> As the Government acknowledges, "th[is] Court has not required a party challenging the application of a statute to show [he relied on prior law] in structuring his conduct." Brief for Respondent 25–26. . . . The essential inquiry, as stated in *Landgraf*, 511 U. S., at 269–270, is "whether the new provision attaches new legal consequences to events completed before its enactment." That is just what occurred here.

Op. at 14-15.

Even though the Court made clear that a showing of reliance is not necessary, the Court found that Mr. Vartelas likely relied on the immigration law as it existed at the time of his conviction. Op. at 15. The Court observed that a showing of reliance or likelihood of reliance on prior law "strengthens the case for reading a newly enacted law prospectively." Op. at 15 (citing *Olatunji*, 387 F.3d at 393) (discussing *INS v. St. Cyr*, 533 U.S. 289, 321 (2001)). The Court concluded that *Fleuti* continues to govern Mr. Vartelas' brief trip abroad.

B. *Fleuti* May Survive Even for LPRs With Post-IIRIRA Convictions

In an important footnote, the Supreme Court acknowledged the BIA's decision *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998), holding that IIRIRA eliminated the *Fleuti* doctrine. Op. at 3-4, n.2. However, the Court took no position on the BIA's decision, stating: "Vartelas does not challenge the ruling in *Collado-Munoz*. We therefore assume, but do not decide, that IIRIRA's amendments to [INA § 101(a)(13)] abrogated *Fleuti*." *Id.* This footnote leaves open the issue of whether IIRIRA in fact eliminated the *Fleuti* doctrine. For briefing on the argument that IIRIRA did not eliminate it, see the Brief of the American Immigration Lawyers Association as Amicus Curiae in Support of Petitioner, *Vartelas v. Holder*, 565 U.S. ___ (2012) (No. 10-1211) (March 28, 2012), located at http://www.aila.org/content/default.aspx?docid=37804. *See also Richardson v. Reno*, 994 F. Supp. 1466, 1471 (S.D. Fla. 1998), *rev'd and vacated on other grounds*, 162 F.2d 1338 (11th Cir. 1998); *Matter of Collado-Munoz*, 21 I&N Dec. at 1067-68 (Rosenberg, dissenting).

II. IMPACT OF *VARTELAS* ON LPRs WHO TAKE BRIEF TRIPS ABROAD

A. How Does *Vartelas* Affect the Immigration Consequences of Pre-IIRIRA Convictions?

1. LPRs with pre-IIRIRA convictions that fall within inadmissibility grounds but not deportability grounds

Under *Vartelas*, LPRs with pre-IIRIRA convictions that fall within a ground of inadmissibility but not a ground of deportability cannot be charged with being inadmissible and cannot be placed in removal proceedings unless they fall outside the scope of *Fleuti* (i.e., the trip fails the brief, casual and innocent test). Two common examples of such LPRs are:

(1) Persons who have a single conviction for marijuana possession of 30 grams or less. Such a conviction triggers inadmissibility under INA § 212(a)(2)(A)(i)(II) but not deportability, *see* INA § 237(a)(2)(B)(i).

(2) Persons who have a single conviction that is a crime involving moral turpitude if the offense was committed more than five years after admission. Such a conviction triggers inadmissibility under INA § 212(a)(2)(A)(i)(I) unless the conviction falls into the petty offense exception, *see* INA § 212(a)(2)(A)(ii)(II), but would not trigger deportability, *see* INA § 237(a)(2)(A)(i)-(ii).

If the Department of Homeland Security (DHS) erroneously initiates removal proceedings based on a pre-IIRIRA conviction that falls within an inadmissibility ground but not a deportability ground, it is appropriate to move to terminate such proceeding under *Vartelas.* Importantly, even if an LPR is charged with several inadmissibility grounds, none can stand unless the person is properly "regarded as seeking an admission" (i.e., unless INA § 101(a)(13)(C) applies). For example, if an LPR is charged with a noncriminal ground of inadmissibility (such as misrepresentation) and criminal inadmissibility, the entire case should be terminated if the criminal inadmissibility is based on a pre-IIRIRA conviction and the travel fits within the *Fleuti* exception.

Further, practitioners may want to provide LPR clients with pre-IIRIRA convictions with a letter asserting that under *Vartelas*, the *Fleuti* doctrine still applies. The letter also may explain the nature of the trip abroad and that the departure was brief, casual and innocent. In addition, practitioners may want to advise their clients about the scope of the *Fleuti* exception and the risk that DHS will initiate removal proceedings if the agency determines the travel does not fit within the exception.

2. LPRs with pre-IIRIRA convictions that do not fall within inadmissibility grounds but do fall within deportability grounds (or fall within both inadmissibility and deportability grounds)

In *Vartelas*, the Petitioner's conviction fell within a ground of inadmissibility, but not a ground of deportability. As such, the Court did not address whether DHS can initiate proceedings against returning LPRs with convictions that do not fall into inadmissibility grounds but do fall into deportability grounds (or convictions that fall into both inadmissibility and deportability grounds). These individuals continue to face the significant possibility that upon return, DHS will issue a Notice to Appear charging grounds of deportability. *See Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976). Any inspection at the border increases the risk of scrutiny of the individual's criminal record for possible deportability charges, even if the individual is admissible.

However, even if DHS initiates removal proceedings based on a pre-IIRIRA conviction that renders the person deportable, *Vartelas* makes clear that this person cannot be "regarded as seeking an admission" – and thus is not an "arriving alien," 8 C.F.R. § 1.1(q) – if the travel was brief, casual and innocent. This is significant because the government takes the position that "arriving aliens" are not eligible for bond hearings. 8 C.F.R. § 1003.19(h)(2)(i)(B). Persons who are *not* arriving aliens can seek a bond redetermination before an immigration judge, s*ee* INA § 236(a), unless the person is subject to mandatory detention under INA § 236(c).[3]

Moreover, because such an LPR is not an "arriving alien," the individual should be permitted to return to the United States and may be eligible for prosecutorial discretion in connection with the decision whether to place him or her into removal proceedings. Prosecutorial discretion is seemingly appropriate because many offenses that would make a person deportable, but not inadmissible, are relatively minor offenses. These include, for example, a minor shoplifting offense that qualifies for the petty offense exception for the crime involving moral turpitude inadmissibility ground, *see* INA § 212(a)(2)(A)(ii)(II), but that renders the person deportable if committed within five years of admission, *see* INA § 237(a)(2)(A)(i)(I).

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[3] Note that the mandatory detention provision only applies to persons released from custody on or after October 8, 1998. *See* IIRIRA § 303(b)(2). For those released from criminal custody after that date, DHS maintains that the person is subject to mandatory detention if the conviction falls within one of the categories set forth in INA § 236(c)(1). *See Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001). Individuals held under the mandatory detention provision may challenge their detention if the conviction is not properly classified as one that falls into the mandatory detention grounds. In addition, many individuals have successfully challenged mandatory detention where they were not taken into immigration custody immediately after release from past criminal custody. *See, e.g., Scarlett v. U.S. Dep't of Homeland Sec.*, 632 F. Supp. 2d 214, 219 (W.D.N.Y. 2009) ("[P]etitioner's detention was not authorized by 8 U.S.C. § 1226(c) [INA § 236(c)] because petitioner was released from incarceration nearly eighteen months prior to his immigration detention").

B. How does *Vartelas* Affect Eligibility for Citizenship?

In some cases, citizenship examiners have taken the position that an LPR who traveled after a conviction should not have been permitted to return (without applying for admission), and therefore is not eligible for citizenship. *Vartelas* forecloses this contention if the LPR's conviction predated IIRIRA and their trip falls within the *Fleuti* doctrine.

C. Does *Vartelas* Distinguish Between Trial and Plea Convictions?

No, *Vartelas* does not distinguish between persons who took their case to trial and those who pled guilty. The Supreme Court found that applying IIRIRA to Mr. Vartelas would attach a new disability based on past events ("offense, plea and conviction"), Op. at 2. *See also* Op. at 11 (noting that the retroactive application of the statute imposes a new disability based on "his conviction"); *id.* at 12 (distinguishing *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006) and finding that "a pre-IIRIRA crime he was 'helpless to undo,'" triggered his arrest); *id.* at 13 (the "new disability rested … on a single crime committed years before IIRIRA's enactment."). Thus, *Vartelas* applies regardless whether there was a trial or plea.

III. SUGGESTED STRATEGIES FOR LPRs PLACED IN REMOVAL PROCEEDINGS AFTER BRIEF TRIPS ABROAD.

This section offers strategies to consider for LPRs whose cases are affected by *Vartelas*. Attached to the end of this advisory are sample motions and a Rule 28(j) letter that may assist practitioners in implementing these strategies.

A. LPRs in Pending Removal Cases

An LPR with a pre-IIRIRA criminal conviction who DHS charged with inadmissibility following a departure from the country should consider filing a motion to terminate with the immigration judge. The motion should explain that: (1) DHS erroneously classified the LPR as seeking an admission under INA § 101(a)(13)(C)(v) and that the LPR cannot be charged with a ground of inadmissibility under INA § 212(a); (2) under *Vartelas*, the *Fleuti* doctrine (not INA § 101(a)(13)(C)(v)) governs cases where the person has pre-IIRIRA convictions; and (3) the person's departure meets the *Fleuti* standard ("innocent, casual and brief"). (See Sample A.) If the case is pending before the BIA, the LPR can file a motion to remand to the immigration judge for purposes of considering whether termination under *Vartelas* is warranted. (See Sample B.)

Note, however, that if an LPR has a criminal offense that falls within the grounds of deportability (INA § 237(a)(2)), DHS may attempt to amend the Notice to Appear to lodge a charge of deportability. *See* 8 C.F.R. § 1240.10(e). *See Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976).

B. LPRs with Final Orders

An LPR who filed a petition for review challenging a final order should consider pursuing *both* the suggested strategy for court of appeals cases and an administrative motion.

Pending Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand the case to the BIA under *Vartelas*. The Department of Justice attorney may consent to such a motion. If briefing is ongoing, the opening brief and/or the reply brief should address *Vartelas*. If briefing is complete, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Vartelas* and its relevance to the case. (See Sample D.)

Denied Petition for Review. If the court of appeals denied a petition for review, and the court has not issued the mandate, a person may file a motion to stay the mandate. (See Sample E.) If the court has issued the mandate, the person may file a motion to recall (withdraw) the mandate. (See Sample E.) Through the motion, the person should ask the court to reconsider its prior decision in light of *Vartelas* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Vartelas*.

Administrative Motion to Reconsider or Reopen. Regardless whether an individual sought judicial review, she or he may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case).[4] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely filed.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i). (See Sample C.) If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Vartelas*, i.e., by April 27, 2012 or by June 26, 2012, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Vartelas* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision in *Vartelas* or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to request *sua sponte* reopening in the alternative.[5]

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[4] There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* INA § 240(c)(6)(C).

[5] Note, however, that courts of appeals have held that they lack jurisdiction to judicially review the BIA's denial of a *sua sponte* motion. *See Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999);

Importantly, some LPRs may not benefit from filing an administrative motion. Specifically, if the pre-IIRIRA conviction falls within a ground of deportability, DHS may attempt to amend the Notice to Appear with a charge of deportability.

C. LPRs who are Outside the United States

An individual's physical location outside the United States arguably should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1761 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate (see Sample E) and then grants a petition for review, DHS should facilitate the petitioner's return to the United States as a lawful permanent resident.[6]

LPRs outside the United States who are considering filing administrative motions should consider whether the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), will pose an additional obstacle to obtaining relief. The BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions. *See Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). To date, seven courts of appeals have invalidated the bar. *See Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011) (same); *Contreras-Bocanegra v. Holder*, No. 10-9500, -- F.3d --, 2012 U.S. App. LEXIS 1964 (10th Cir. Jan. 30, 2012) (en banc). If filing a motion to reconsider or reopen in the Fifth, Eighth, or Eleventh Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen statute or

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Ali v. Gonzales, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

[6] *See* ICE Policy 11061.1, Facilitating the Return to the United States if Certain Lawfully Removed Aliens, located at http://www.nationalimmigrationproject.org/legalresources/ICE_Return_Policy_Memo_Feb_2012.pdf.

impermissibly contracts the BIA's jurisdiction. Thus, it advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is timely filed or the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Thus, for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening as the post departure bar litigation has not been as successful in the *sua sponte* context. *See, e.g.*, *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010). In addition, as stated above, some courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.[7]

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nationalimmigrationproject.org or Beth Werlin at bwerlin@immcouncil.org.

IV. OTHER POTENTIAL FAVORABLE IMPACTS OF *VARTELAS*

The Supreme Court's decision in *Vartelas* also has important implications for challenges to the retroactive application of other immigration provisions and provides support for a broad reading of the criminal defense lawyer's duty under *Padilla v. Kentucky*. This section presents a brief preliminary analysis of some of the potential implications and arguments.

A. Support for Challenges to Retroactive Application of Other Immigration Provisions

1. The Court's discussion of why reliance is not necessary to establish that a law is impermissibly retroactive.

Vartelas has important implications for challenging the retroactive application of other immigration provisions, especially where courts previously have rejected such challenges because the person had not shown reliance on the prior law.

First, *Vartelas* notes that the Court has never required a party to show specific reliance on prior law to invoke the presumption against retroactivity, Op. at 14, and that the presumption applies equally when the relevant conduct is "morally reprehensible or illegal." *Id.* at 14 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 283 (1994)). The Court emphasizes that the "operative presumption . . . is that Congress intends its law to govern prospectively only." *Id.*

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[7] For additional information on the departure bar regulations, see AIC and NIPNLG's Practice Advisory, "Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues," (March 14, 2012) located at http://www.nationalimmigrationproject.org/legalresources/cd_3-14-2012-Departure-Bar-Practice-Advisory.pdf and http://www.legalactioncenter.org/sites/default/files/departure_bar_practice_advisory.pdf.

at 15. As the Court explains "[i]t is a strange 'presumption' … that arises only on … a showing [of] actual reliance." *Id*. (quoting *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (2004) (rejecting the plea/trial distinction in the context of § 212(c) relief)). Thus, the Court concludes that the key issue is whether the "'new provision attaches new legal consequences to events completed before its enactment.' That is just what occurred here." *Id.* (quoting *Landgraf*, 511 U.S. at 269-70).[8]

Indeed, the Court describes the Second Circuit's "treating reliance as essential" as a "misperception." *Id*. at 16. In rejecting the lower court's improper emphasis on reliance, the Court notes that the Second Circuit "homed in on the words 'committed an offense' in § 1101(a)(13(C)(v) in determining that the change IIRIRA wrought had no retroactive effect." *Id.* at 14. The Second Circuit thus concluded, "'[i]t could border on the absurd … to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration laws.'" Op. at 14. But, as the Supreme Court held, this reasoning is "flawed." *Id.* The Supreme Court's rejection of the Second Circuit's analysis is especially noteworthy because numerous other circuit courts have adopted similar flawed reasoning (even using the same language). *See, e.g.*, *Laguerre v. Reno*, 164 F. 3d 1035, 1041 (7th Cir. 1998), *cert. denied*, 528 U. S. 1153 (2000) (first use of the "border on the absurd" language); *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F. 3d 1116 (9th Cir. 2002); *Domond v. INS*, 244 F. 3d 81 (2d Cir. 2001); *Jurado-Gutierrez v. Greene*, 190 F. 3d 1135 (10th Cir. 1999), *cert. denied sub nom.*, *Palaganas-Suarez v. Greene*, 529 U.S. 1041 (2000).

Finally, the Supreme Court notes that the case against retroactivity is stronger where, as in *Vartelas*, the retroactive application of a new law renders a person removable, though they would otherwise not be removable. *See* Op. at 16 (suggesting that Mr. Vartelas' case is even easier than in the case of *INS v. St. Cyr*, 533 U.S. 289, 321 (2001), where relief eligibility rather than deportability was at issue). Nonetheless, its overall doctrinal reasoning either overrules or undermines circuit court case law requiring some showing of reliance.

2. *Vartelas* supports reexamination of circuit court retroactivity precedents.

The Supreme Court's rejection of a reliance requirement is significant because much of the current circuit court case law presumes that proof of reliance, either on an individual-specific or categorical basis, is required to show that a law is retroactive. Over the past ten years, many courts have affirmed the retroactive application of new laws in situations where a person went to trial rather than plead guilty, or where the issue turned on conduct (such as commission of an offense), rather than a calculated decision (such as a plea). The following are some examples of the contexts where circuit courts have determined or suggested that some showing of reliance is necessary before application of the presumption against retroactive legislation:

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[8] Nonetheless, the Court finds that "in any event" Mr. Vartelas likely relied on then-existing immigration law. Op. at 15. It noted that "[a]lthough not a necessary predicate for invoking the antiretroactivity principle, the likelihood of reliance on prior law strengthens the case for reading a new law prospectively." *Id.*

- **Whether former INA § 212(c) relief for long-time LPRs is available to persons who went to trial prior to AEDPA and IIRIRA**. *See, e.g.*, *Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010); *Kellermann v. Holder*, 592 F.3d 700 (6th Cir. 2010); *Ferguson v. U.S. Atty. Gen.*, 563 F.3d 1254 (11th Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 2299 (2010); *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006); *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), *petition for reh'g denied*, 2003 U.S. App. LEXIS 14474; *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002).

- **Whether § 212(c) relief is available to persons whose *conduct* preceded AEDPA and IIRIRA.** *See, e.g.*, *Domond v. INS*, 244 F.3d 81, 86 (2d Cir. 2001) (holding that the repeal of § 212(c) relief could be applied in a case where only the criminal conduct and not the conviction preceded the repeal because "it cannot reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation.").

- **Whether the LPR cancellation of removal clock stop rule applies to persons whose convictions or conduct preceded IIRIRA.** *See, e.g.*, *Zuluaga-Martinez v. INS*, 523 F.3d 365 (2d Cir. 2008) (finding no impermissible retroactive effect absent a showing of reliance on prior law); *Valencia-Alvarez v. Gonzales*, 469 F. 3d 1319 (9th Cir. 2006).

Because *Vartelas* squarely rejects any conclusion or suggestion that reliance is required to demonstrate an impermissible retroactive effect, the holdings in these cases are susceptible to challenge.

B. Support for a Broad Reading of the Criminal Defense Lawyer's Duty Under *Padilla v. Kentucky*

Vartelas also has potential implications for noncitizens with claims that their criminal defense lawyer did not provide effective assistance of counsel. In *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), the Supreme Court held that effective assistance of counsel includes advising a noncitizen defendant about the immigration consequences of a guilty plea. The test for ineffective assistance requires a defendant to show both deficient performance and that the defendant suffered prejudice from counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). The *Padilla* Court, however, did not precisely define the exact scope of defense counsel's duty.[9] Since *Padilla*, certain commentators take the view that under *Padilla* defense counsel has an affirmative obligation in every case to research the law and to

[9] The issue of prejudice was not before the *Padilla* Court.

mitigate harm in those cases where the defendant wanted to avoid adverse immigration consequences.[10]

The very recent Supreme Court decisions issued in *Lafler v. Cooper*, No. 10–209, 565 U.S. ___ (March 21, 2012), and its companion case *Missouri v. Frye*, No. 10–444, 565 U.S. ___ (March 21, 2012), reaffirm that defense counsel's duty to provide effective assistance includes plea-bargaining advice even where the defendant may have otherwise received a fair trial.[11] Regarding the prejudice prong of *Strickland*, the Court in *Frye* recognized that a defendant could demonstrate prejudice without stating that she would have gone to trial had she received correct advice, which was the holding in *Hill v. Lockhart*, 474 U.S. 52 (1985). *See Frye*, Op. at 11. In *Frye*, the Court said: "*Hill* does not, however, provide the *sole* means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations." *Id.*

A week after issuing *Frye* and *Lafler*, the Court in *Vartelas* commented that:

> Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e.g.*, possession of counterfeit securities—or exercise a right to trial.

Op. at 16 n.10.

Although footnote 10 does not expressly cite to *Padilla*, the language in the footnote supports the view that the scope of defense counsel's obligation includes investigating the availability of alternative pleas. In addition, the footnote together with *Frye* suggests that a defendant can establish prejudice to satisfy the second prong in *Strickland* by demonstrating that the defendant would have rejected the disposition and sought an alternative and obtainable plea to avoid adverse immigration consequences. Post-conviction counsel should keep in mind that a defendant has no right to receive a specific plea offer. *Frye*, Op. at 12. What remains a vital argument, however, is that, but for defense counsel's ineffective assistance, defendant could have received a plea that would have avoided adverse immigration consequences.

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[10] *See* Nash, Lindsay C., *Considering the Scope of Advisal Duties Under Padilla*, 33 Cardozo L. Rev. 101 (November 5, 2011); A *Defending Immigrants Partnership* Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*, April 6, 2010 (revised April 9, 2010), located at http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf.

[11] *See* NIP and IDP Practice Advisory, "Implications of *Lafler v. Cooper* on Retroactive Application of *Padilla v. Kentucky*" (April 4, 2012), located at http://www.nationalimmigrationproject.org/legalresources/cd_pa_lafler_practice_advisory_final_revised_4.4.2012.pdf.

Footnote 10 also indicates that defense counsel must provide advice regarding grounds of inadmissibility. In *Padilla*, the Court refers throughout to advice regarding "deportation." By suggesting that Mr. Vartelas would have pled to a crime that would not have resulted in his "excludability," the Court suggests that defense counsel must provide advice regarding more than the deportation consequences of an offense, but the inadmissibility consequences as well.[12] *Vartelas*, Op. at 16 n.10.

Finally, the Court identified possession of counterfeit securities, codified at 18 U.S.C. § 474, as an offense that would not involve moral turpitude. *Id*. In so doing, the Court added a rare measure of relative safety to a plea. If faced with a charge that a conviction under 18 U.S.C. § 474 constitutes a crime involving moral turpitude, practitioners should cite to footnote 10 in *Vartelas*.

[12] The Court repeats the link between *Padilla* and § 212(c) relief, which confirms that defense counsel must provide advice about eligibility for relief too. *Vartelas*, Op. at 16 n. 9

SAMPLE MOTIONS

(Excluding Certificates of Service)

A: **Sample Motion to Terminate** if removal case is pending before an immigration judge.

B: **Sample Motion to Remand** if an appeal is pending at the BIA.

C: **Sample Motion to Reconsider** if it has been 30 days or less since the BIA's decision. [Note: this sample may be modified to request reconsideration by an Immigration Judge]

D: **Sample letter pursuant to Federal Rule of Appellate Procedure 28(j)** if a petition for review is currently pending in the court of appeals and briefing has been completed.

E: **Sample Motion to Stay (or Recall) the Mandate** if the court of appeals dismissed the petition for review.

SAMPLE A

Motion to Terminate Removal Proceeding with the Immigration Judge

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
_____,_____

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO TERMINATE PROCEEDINGS IN LIGHT OF *VARTELAS v. HOLDER*

I. <u>INTRODUCTION</u>

Respondent hereby moves the Court to terminate his case in light of the Supreme Court's recent decision in *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012). Under this decision, the Department of Homeland Security (DHS) cannot classify a lawful permanent resident (LPR) whose departure was "innocent, casual and brief" as seeking admission under § 101(a)(13)(C)(v) of the Immigration and Nationality Act (INA) based on a conviction before April 1, 1997. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. As a result, these LPR's are not subject to the grounds of inadmissibility under INA § 212(a).

The Court reasoned that application of § 101(a)(13)(C)(v)[13] would have impermissible retroactive effect if applied to these individuals because, at the time of their conviction, they could travel abroad without jeopardizing their LPR status. *See Vartelas*, 2012 U.S. LEXIS 2540 at *9-10 *discussing Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

In the instant case, DHS classified Respondent, a lawful permanent resident, as seeking admission pursuant to INA § 101(a)(13)(C)(v) after returning to the United States from a trip abroad. DHS then charged Respondent with inadmissibility under INA § 212(a)(2)(___). The Supreme Court's decision in *Vartelas* renders DHS' classification and charge of inadmissibility erroneous because Respondent's departure was "innocent, casual, and brief." Therefore, the Court should terminate removal proceedings against Respondent.

II. STATEMENT OF RELEVANT FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. On ___, Respondent departed the United States. Upon return, the DHS classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v) and charged Respondent with inadmissibility under INA § 212(a)(2)(__) for having been convicted of _____ on _____ [note: conviction date must be before April 1, 1997 for *Vartelas* to apply].

III. ARGUMENT

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[13] Section 101(a)(13)(C)(v) states:
(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
. . .
(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, ...

A. DHS ERRONEOUSLY CLASSIFIED RESPONDENT AS SEEKING ADMISSION PURSUANT TO INA § 101(a)(13)(C)(v).

Prior to April 1, 1997, LPRs with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was "brief, casual and innocent." *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). This commonly is referred to as the "*Fleuti* doctrine."

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended INA § 101(a)(13)(C)(v), which allows immigration authorities to classify LPRs as seeking admission if they have committed an offense identified in INA § 212(a)(2). The Board of Immigration Appeals took the position that amended § 101(a)(13) eliminated this *Fleuti* exemption for LPRs who had committed a criminal offense that fell within the grounds of inadmissibility. *See Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998). In *Vartelas*, the Supreme Court held that INA § 101(a)(13)(C)(v) does not apply retroactively to LPRs, like Mr. Vartelas, who committed an offense prior to IIRIRA. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. The Court reasoned that retroactive application of INA § 101(a)(13)(C)(v) would attach "a new disability" to conduct completed well before the provision's enactment. *Id*. The Court stated:

> Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a "new disability." Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas, 2012 U.S. LEXIS 2540 at *20. Thus, the Court concluded that the *Fleuti* doctrine continues to govern Mr. Vartelas' trip abroad. *Vartelas*, 2012 U.S. LEXIS 2540 at *34.

Like the petitioner in *Vartelas*, Respondent is an LPR who DHS classifies as "seeking an admission" pursuant to INA § 101(a)(13)(C)(v) based on an alleged commission of an offense identified in INA § 212(a)(2) prior to April 1, 1997. Under the Supreme Court's decision in *Vartelas*, DHS's classification of Respondent as "seeking an admission" is impermissibly retroactive. The pre-IIRIRA legal regime, including the *Fleuti* doctrine, continues to govern Respondent's trip abroad.

B. THE COURT SHOULD TERMINATE REMOVAL PROCEEDINGS BECAUSE RESPONDENT'S DEPARTURE WAS "INNONCENT, CASUAL AND BRIEF."

Under the pre-IIRIRA law in effect at the time Respondent allegedly committed the criminal offense, a lawful permanent resident would not be deemed to be an alien seeking admission if "his departure to a foreign port or place... was not intended or reasonably to be expected by him...." *See* former INA § 101(a)(13) (1995). In *Fleuti*, the Supreme Court held that departures are "not intended" when they are "innocent, casual, and brief" trips abroad. *Fleuti*, 374 U.S. at 461-62. The Court further stated that the intent exception to former § 101(a)(13) means "an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Fleuti*, 374 U.S. at 462.

In *Fleuti*, the Court looked at three factors in determining that the lawful permanent resident in that case did not "enter" the United States after his trip to Mexico: (1) the length of the trip; (2) the purpose of the trip; and (3) the necessity of travel documents. *Fleuti*, 374 U.S. at 462. The Court held that these factors were instructive, although not exhaustive, when considering whether a lawful permanent resident displayed an intention to depart the United

States. *Id*. The Court indicated that courts might develop additional factors "by the gradual process of judicial inclusion and exclusion." *Fleuti*, 374 U.S. at 462.

Prior to IIRIRA, the Board of Immigration Appeals (BIA) and courts of appeals developed case law addressing the *Fleuti* factors. *See, e.g., Matter of Guimaraes*, 10 I&N Dec. 529, 531 (BIA 1954) (holding that intention not to disrupt permanent residence status alone is not determinative in the *Fleuti* analysis, but is one factor to consider); *Molina v. Sewell*, 983 F.2d 676, 679-80 (5th Cir. 1993) (finding that LPR had not made an "entry" as a matter of law due to the existence of pending deportation proceedings at the time of departure; rejecting BIA's contrary decision in *Matter of Becerra-Miranda*, 12 I&N Dec. 358 (BIA 1967)); *Lozano-Giron v. INS*, 506 F.2d 1073, 1077-78 (7th Cir. 1974) (considering length of permanent residency, whether family lives with LPR, whether LPR owns a business or a home in the United States, and "the nature of the environment to which he would be deported, and his relation to that environment"); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1362-63 (9th Cir. 1995) (considering whether absence was temporary by design and limited in duration, whether the purpose of the absence was to accomplish an object not contrary to immigration laws, and whether the absence was occasional or if absences occurred with regularity).[14]

Respondent's case falls within the *Fleuti* doctrine because his trip to _____ was "innocent, casual, and brief" and not "meaningfully interruptive" of his lawful permanent

[14] [Optional: if purpose of the trip possibly involved illegal activity] Innocence is a complicated factor. *Compare Yanez-Jacquez v. INS*, 440 F.2d 701, 704 (5th Cir. 1971) (holding that return following less than 24 hour trip to Mexico was not an entry even though the trip was not "innocent" because it was for an illegal purpose) *with Matter of Contreras*, 18 I&N Dec. 30, 32 (BIA 1981) (finding return after 3 hour trip to Mexico constituted an "entry" where the primary purpose if the trip was illegal).

resident status. *Fleuti*, 374 U.S. at 462. Respondent's trip lasted ___ days. The primary purpose of the trip was to __ [state purpose of trip]. Respondent indicated his intent to return to the United States in several ways. For example, at the time of departure, Respondent already had purchased a return ticket to the United States. In addition, _____[indicate other evidence of an intent to return]. [If applicable: Respondent owns a home [and/or] business in the United States]. Respondent's family, including [his/her] _____[insert family members] reside in the United States. [Insert information explaining family, work and community ties to the United States].

In sum, Respondent's trip was "innocent, casual and brief" and, therefore, falls within the *Fleuti* doctrine. Accordingly, Respondent is not subject to the grounds of inadmissibility pursuant to INA § 212(a)(2)(____) and the Court should terminate the instant removal proceedings.

IV. CONCLUSION

In light of the Supreme Court's decision in *Vartelas v. Holder*, DHS erroneously classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v). Respondent's case is governed by the *Fleuti* doctrine. The Court should find that Respondent's trip was "innocent, casual, and brief" and terminate removal proceedings.

Dated: _____ Respectfully submitted,

_____

SAMPLE B

Motion to Remand from BIA to Immigration Judge

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

If there are facts in the record indicating the person's trip was "innocent, casual and brief," practitioners should consider modifying this sample brief to ask the Board to terminate proceedings (rather than remand the case to the immigration

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO REMAND TO THE IMMIGRATION JUDGE IN LIGHT OF *VARTELAS v. HOLDER*

I. <u>INTRODUCTION</u>

Respondent hereby moves the Board of Immigration Appeals (BIA or Board) to remand this case in light of the Supreme Court's recent decision in *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012). Under this decision, the Department of Homeland Security (DHS) cannot classify a lawful permanent resident (LPR)

whose departure was "innocent, casual and brief" as seeking admission under § 101(a)(13)(C)(v) of the Immigration and Nationality Act (INA) based on a conviction before April 1, 1997. *Vartelas,* 2012 U.S. LEXIS 2540 at *19-20. As a result, these LPR's are not subject to the grounds of inadmissibility under INA § 212(a). The Court reasoned that application of § 101(a)(13)(C)(v)[15] would have impermissible retroactive effect if applied to these individuals because, at the time of their conviction, they could travel abroad without jeopardizing their LPR status. *See Vartelas,* 2012 U.S. LEXIS 2540 at *9-10 *discussing Rosenberg v. Fleuti,* 374 U.S. 449 (1963).

In the instant case, DHS classified Respondent, a lawful permanent resident, as "seeking an admission" pursuant to INA § 101(a)(13)(C)(v) after returning to the United States from a trip abroad. DHS then charged Respondent with inadmissibility under INA § 212(a)(2)(___). The Supreme Court's decision in *Vartelas* means that the pre-IIRIRA legal regime applies to Respondent. Therefore, the Board should remand this case to the Immigration Judge to determine whether Respondent's departure was "innocent, casual and brief."

II. STATEMENT OF RELEVANT FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. On ___, Respondent departed the United States. Upon return, the DHS classified Respondent as seeking

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[15] Section 101(a)(13)(C)(v) states:
(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
. . .
(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, ...

admission pursuant to INA § 101(a)(13)(C)(v) and charged Respondent with inadmissibility under INA § 212(a)(2)(__) for having been convicted of _____ on _____ [note: conviction date must be before April 1, 1997 for *Vartelas* to apply].

On ___, the Immigration Judge ordered Respondent removed from the United States. Respondent timely appealed.

III. ARGUMENT

A. DHS ERRONEOUSLY CLASSIFIED RESPONDENT AS SEEKING ADMISSION PURSUANT TO INA § 101(a)(13)(C)(v).

Prior to April 1, 1997, LPRs with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was "brief, casual and innocent." *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). This commonly is referred to as the "*Fleuti* doctrine."

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended INA § 101(a)(13)(C)(v), which allows immigration authorities to classify LPRs as seeking admission if they have committed an offense identified in INA § 212(a)(2). The Board of Immigration Appeals took the position that amended § 101(a)(13) eliminated this *Fleuti* exemption for LPRs who had committed a criminal offense that fell within the grounds of inadmissibility. *See Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998). In *Vartelas*, the Supreme Court held that INA § 101(a)(13)(C)(v) does not apply retroactively to LPRs, like Mr. Vartelas, who committed an offense prior to IIRIRA. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. The Court reasoned that retroactive application of INA § 101(a)(13)(C)(v)

would attach "a new disability" to conduct completed well before the provision's enactment. *Id.* The Court stated:

> Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a "new disability." Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas, 2012 U.S. LEXIS 2540 at *20. Thus, the Court concluded that the *Fleuti* doctrine continues to govern Mr. Vartelas' trip abroad. *Vartelas,* 2012 U.S. LEXIS 2540 at *34.

Like the petitioner in *Vartelas*, Respondent is an LPR who DHS classifies as "seeking an admission" pursuant to INA § 101(a)(13)(C)(v) based on an alleged commission of an offense identified in INA § 212(a)(2) prior to April 1, 1997. Under the Supreme Court's decision in *Vartelas*, DHS's classification of Respondent as "seeking an admission" is impermissibly retroactive. The pre-IIRIRA legal regime, including the *Fleuti* doctrine, continues to govern Respondent's trip abroad.

B. THE BOARD SHOULD REMAND THIS CASE TO THE IMMIGRATION JUDGE TO DETERMINE WHETHER RESPONDENT'S DEPARTURE WAS "INNOCENT, CASUAL AND BRIEF."

The Immigration Judge in this case did not determine whether Respondent's departure was "innocent, casual and brief" during the course of Respondent's removal proceedings. The Board "will not engage in factfinding in the course of deciding appeals." 8 C.F.R. § 1003.1(d)(3)(iv). Because assessing whether Respondent's trip falls under the *Fleuit* doctrine requires fact finding, the Board should remand this case to the Immigration Judge to make that assessment. If the Immigration Judge determines that Respondent's trip was "innocent, casual

and brief," Respondent is not subject to the grounds of inadmissibility pursuant to INA § 212(a)(2)(__), and the Immigration Judge should terminate removal proceedings.

IV. CONCLUSION

In light of the Supreme Court's decision in *Vartelas v. Holder*, DHS erroneously classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v). Respondent's case is governed by the *Fleuti* doctrine. Respondent respectfully requests that the Board remand this case to the Immigration Judge to determine whether Respondent's departure was "innocent, casual and brief."

Dated: _____ Respectfully submitted,

_____

SAMPLE C

Motion to Reconsider with the BIA

[Note: this sample may be modified to request reconsideration by an Immigration Judge]

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

If there are facts in the record indicating the person's trip was "innocent, casual and brief," practitioners should consider modifying this sample brief to ask the Board to terminate proceedings (rather than remand the case to the immigration court).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO RECONSIDER IN LIGHT OF *VARTELAS v. HOLDER*

I. <u>INTRODUCTION</u>

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, hereby seeks reconsideration of this case in light of the Supreme Court's recent decision in *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012). Under this decision, the Department of Homeland Security (DHS) cannot

classify a lawful permanent resident (LPR) whose departure was "innocent, casual and brief" as seeking admission under § 101(a)(13)(C)(v) of the Immigration and Nationality Act (INA) based on a conviction before April 1, 1997. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. As a result, these LPR's are not subject to the grounds of inadmissibility under INA § 212(a). The Court reasoned that application of § 101(a)(13)(C)(v)[16] would have impermissible retroactive effect if applied to these individuals because, at the time of their conviction, they could travel abroad without jeopardizing their LPR status. *See Vartelas*, 2012 U.S. LEXIS 2540 at *9-10 *discussing Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

In the instant case, DHS classified Respondent, a lawful permanent resident, as "seeking admission" pursuant to INA § 101(a)(13)(C)(v) after returning to the United States from a trip abroad. DHS then charged Respondent with inadmissibility under INA § 212(a)(2)(___). The Supreme Court's decision in *Vartelas* means that the pre-IIRIRA legal regime applies to Respondent. Therefore, the Board should reconsider its decision and remand this case to the Immigration Judge to determine whether Respondent's departure was "innocent, casual and brief."

II. RELEVANT STATEMENT OF FACTS AND STATEMENT OF THE CASE

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[16] Section 101(a)(13)(C)(v) states:
(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
. . .
(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, ...

Respondent became a lawful permanent resident on _____. On ___, Respondent departed the United States. Upon return, the Department of Homeland Security (DHS) classified Respondent as seeking admission pursuant to INA § 101(a)(13)(C)(v) and charged Respondent with inadmissibility under INA § 212(a)(2)(__) for having been convicted of _____ on _____ [note: conviction date must be before April 1, 1997 for *Vartelas* to apply].

On ___, the Immigration Judge ordered Respondent removed from the United States. Respondent timely appealed. This Board affirmed the IJ's decision on _____**.**

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

[Note: if filing a motion to reconsider or reopen before the Immigration Judge, the applicable regulation is 8 C.F.R. § 1003.23(b)(1)(i)]

(1) the validity of the removal order [has been or is OR has not and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is: _____. The proceeding took place on: _____. The outcome is as follows _____.

(2) The validity of the removal order [has not been and is not OR has been and is] the subject of a judicial proceeding.

(3) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. [If applicable] The current status of this proceeding is: _____.

(4) Respondent [is OR is not] currently the subject of any pending criminal prosecution. [If applicable] The current status of this prosecution is _____.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider. INA § 240(c)(6)(A), 8 C.F.R. § 1003.2(b)(2).

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.2(b)(2), or as soon as practicable after finding out about the decision. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (holding that statutory administrative appeal deadline is a procedural, not jurisdictional, rule); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must "exercise reasonable diligence in investigating and bringing the claim") (internal quotation omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired") (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (holding that "all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim") (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) holding that BIA

must consider noncitizens due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *but see Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (finding, in case pre-dating *Henderson*, motion to reopen deadline "jurisdictional and mandatory"). The Supreme Court issued its decision in *Vartelas* on March 28, 2012. Respondent is filing this motion as soon as practicable after the Supreme Court's ruling.

> [Consider adding paragraph below if the person has not been removed and the statutory motion deadline has elapsed].

In the alternative, Respondent seeks *sua sponte* reconsideration pursuant to 8 C.F.R. § 1003.2(a) based on a fundamental change in law. The Board has held that an "exceptional situations" standard applies when adjudicating a *sua sponte* motion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the law constitutes an exceptional circumstance. *See, e.g.*, *Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999) (declining to reopen or reconsider *sua sponte* where case law represented only "incremental development" of the law); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of "refugee" warranted *sua sponte* reopening); *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002) (due to passage of time, BIA withdrew from its "policy" announced in *Matter of X-G-W-*).

IV. ARGUMENT

A. THE BOARD SHOULD RECONSIDER ITS DECISION IN LIGHT OF THE SUPREME COURT'S DECISION IN *VARTELAS v. HOLDER* BECAUSE DHS ERRONEOUSLY CLASSIFIED RESPONDENT AS SEEKING ADMISSION PURSUANT TO INA § 101(a)(13)(C)(v).

Prior to April 1, 1997, LPRs with criminal convictions who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was "brief, casual and innocent." *See Rosenberg v. Fleuti*, 374 U.S. 449 (1963). This commonly is referred to as the "*Fleuti* doctrine."

Through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended INA § 101(a)(13)(C)(v), which allows immigration authorities to classify LPRs as seeking admission if they have committed an offense identified in INA § 212(a)(2). The Board of Immigration Appeals took the position that amended § 101(a)(13) eliminated this *Fleuti* exemption for LPRs who had committed a criminal offense that fell within the grounds of inadmissibility. *See Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998). In *Vartelas*, the Supreme Court held that INA § 101(a)(13)(C)(v) does not apply retroactively to LPRs, like Mr. Vartelas, who committed an offense prior to IIRIRA. *Vartelas*, 2012 U.S. LEXIS 2540 at *19-20. The Court reasoned that retroactive application of INA § 101(a)(13)(C)(v) would attach "a new disability" to conduct completed well before the provision's enactment. *Id*. The Court stated:

> Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a "new disability." Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas, 2012 U.S. LEXIS 2540 at *20. Thus, the Court concluded that the *Fleuti* doctrine continues to govern Mr. Vartelas' trip abroad. *Vartelas*, 2012 U.S. LEXIS 2540 at *34.

Like the petitioner in *Vartelas*, Respondent is an LPR who DHS classifies as "seeking an admission" pursuant to INA § 101(a)(13)(C)(v) based on an alleged commission of an offense

identified in INA § 212(a)(2) prior to April 1, 1997. Under the Supreme Court's decision in *Vartelas*, DHS's classification of Respondent as "seeking an admission" is impermissibly retroactive. The pre-IIRIRA legal regime, including the *Fleuti* doctrine, continues to govern Respondent's trip abroad.

B. THE BOARD SHOULD REMAND THIS CASE TO THE IMMIGRATION JUDGE TO DETERMINE WHETHER RESPONDENT'S DEPARTURE WAS "INNOCENT, CASUAL AND BRIEF."

The Immigration Judge in this case did not determine whether Respondent's departure was "innocent, casual and brief" during the course of Respondent's removal proceedings. The Board "will not engage in factfinding in the course of deciding appeals." 8 C.F.R. § 1003.1(d)(3)(iv). Because assessing whether Respondent's trip falls under the *Fleuit* doctrine requires fact finding, the Board should remand this case to the Immigration Judge to make that assessment. If the Immigration Judge determines that Respondent's trip was "innocent, casual and brief," Respondent is not subject to the grounds of inadmissibility pursuant to INA § 212(a)(2)(____) and the Immigration Judge should terminate removal proceedings.

V. CONCLUSION

The Supreme Court's decision in *Vartelas v. Holder* is a fundamental change in the law that nullifies the Board's decision in this case. Respondent respectfully requests the Board reconsider its decision and remand the case to the Immigration Judge to determine whether Respondent's trip abroad was "innocent, brief and casual."

Dated: _____ Respectfully submitted,

SAMPLE D

Letter pursuant to Federal Rule of Appellate Procedure 28(j)
(Pursuant to the rule, the body of the letter must not exceed 350 words)

This letter is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal

Clerk of the Court
U.S. Court of Appeals for the _____Circuit
ADDRESS

Re: _____ v. _____
Case No. _____

Dear Clerk of the Court:

Pursuant to Federal Rule of Appellate Procedure 28(j), Petitioner submits *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540 (March 28, 2012).

In *Vartelas*, the Supreme Court held that 8 U.S.C. § 1101(a)(13)(C)(v) does not apply retroactively to lawful permanent residents convicted of a crime before April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Rather, the pre-IIRIRA regime applies to these individuals. Under the pre-IIRIRA regime, lawful permanent residents who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was "innocent, casual and brief." *Vartelas*, 2012 U.S. LEXIS 2540 at *9-13, *34 *discussing Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

Vartelas is applicable to this case because_____.
Vartelas supports the position in Petitioner's brief at pages _____ that the instant petition for review should be granted.

Respectfully submitted,

_____

cc:
Office of Immigration Litigation
U.S. Department of Justice, Civil Division

P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

SAMPLE E

Motion to Stay or Recall the Mandate at Court of Appeals

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

IN THE UNITED STATES COURT OF APPEALS

FOR THE _____CIRCUIT

_____	)	Case No. _____
Petitioner,	)	
v.	)	
Eric H. Holder, Jr., Attorney General,	)	
Respondent.	)	
_____)		

MOTION TO STAY [OR RECALL] THE MANDATE IN LIGHT OF THE SUPREME COURT'S DECISION IN *VARTELAS v. HOLDER*

I. INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 27 and 41 [and INSERT ANY APPLICABLE LOCAL RULE], Petitioner moves this Court to stay [or recall] the mandate in this case in light of the Supreme Court's recent decision in *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, 2012 U.S. LEXIS 2540, 2012 WL 1019971 (March 28, 2012).

II. RELEVANT PROCEDURAL HISTORY

Petitioner became a lawful permanent resident on _____. On ___, Petitioner departed the United States. Upon return, the Department of Homeland Security (DHS) classified Petitioner as seeking admission pursuant to 8 U.S.C. § 1101(a)(13)(C)(v) and charged Petitioner with inadmissibility under 8 U.S.C. § 1182 (a)(2)(__) for having been convicted of _____ on _____ [note: conviction date must be before April 1, 1997 for *Vartelas* to apply].

On ___, an immigration judge ordered Petitioner removed from the United States. On _____, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision.

Petitioner then filed a petition for review of the BIA's decision with this Court. On _____, this Court [dismissed OR denied] the petition for review, affirming the BIA's decision. The Court's decision relied on [then binding circuit case law OR Board precedent]. [Insert applicable circuit case/s: *Vartelas v. Holder*, 620 F.3d 108 (2d Cir. 2010); *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998) (en banc)]. The mandate either is [set to issue on _____OR has issued on _____].

The Supreme Court's decision in *Vartelas* was issued on March 28, 2012. Petitioner is filing this motion as soon as practicable following the Court's decision.

III. ARGUMENT

The Court should stay or recall the mandate in light of the Supreme Court's decision in *Vartelas*. In *Vartelas*, the Supreme Court held that 8 U.S.C. § 1101(a)(13)(C)(v) does not apply retroactively to lawful permanent residents convicted of a crime before April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. The Court further held that the pre-IIRIRA regime applies to these individuals. Under the pre-IIRIRA regime, lawful permanent residents who traveled abroad did not, upon their return, face inadmissibility – then called excludability – if their trip was "innocent, casual and brief." *See Vartelas*, 2012 U.S. LEXIS 2540 at *9-*13 and *34 *discussing Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (known as the *Fleuti* doctrine).

The Court reasoned that retroactive application of INA § 101(a)(13)(C)(v) would attach "a new disability" to conduct done well before the provision's enactment. *Id.* The Court stated:

> Beyond genuine doubt, we note, the restraint §1101(a)(13)(C)(v) [INA § 101(a)(13)(C)(v)] places on lawful permanent residents like Vartelas ranks as a "new disability." Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment.

Vartelas, 2012 U.S. LEXIS 2540 at *20. Thus, the Court concluded that the *Fleuti* doctrine continues to govern Mr. Vartelas' trip abroad. *Vartelas*, 2012 U.S. LEXIS 2540 at *34.

Vartelas is applicable in this case because _____

_____. The Court's decision in *Vartelas* nullifies the Board's decision.

Thus, a recall of the mandate is warranted in order to prevent injustice and to allow Petitioner to demonstrate that his departure was "innocent, casual and brief" and that, therefore, Petitioner was erroneously charged with being inadmissible.

Insert discussion of:

Relevant circuit law regarding stay or recall of the mandate; and

Petitioner's equities:
[if deported: how Petitioner has been affected by unlawful removal order]
OR
[if not deported: how Petitioner will be affected by deportation]

IV. POSITION OF OPPOSING COUNSEL

Undersigned counsel contacted _____, counsel for Respondent. _____ indicated that Respondent [opposes OR does not oppose OR takes no position on] the instant motion.

V. CONCLUSION

For the foregoing reasons, this Court should [recall the mandate OR stay the mandate] and reconsider the instant petition for review. In accordance with the Supreme Court's decision in *Vartelas v. Holder*, the Court should reverse the BIA's decision and remand the case for further proceedings.

Dated: _____ Respectfully submitted,

_____