

Washington Law Review

Volume 82 | Number 1

2-1-2007

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Recommended Citation

Joanna R. Mareth, Notes and Comments, *New Word, Same Problems: Entry, Arrival, and the One-Year Deadline for Asylum Seekers*, 82 Wash. L. Rev. 149 (2007).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol82/iss1/12>

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NEW WORD, SAME PROBLEMS: ENTRY, ARRIVAL, AND THE ONE-YEAR DEADLINE FOR ASYLUM SEEKERS

Joanna R. Mareth

Abstract: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) imposed a one-year filing deadline on all applications for asylum. Under this law, an alien applying for asylum bears the burden of showing that he or she applied for asylum within one year of arrival into the United States. The word “arrival” is not defined in immigration law, but the Second Circuit recently held that not every border crossing into the country is an “arrival” for purposes of the asylum filing deadline. The court’s reasoning was reminiscent of the U.S. Supreme Court’s 1963 decision in *Rosenberg v. Fleuti*, which held that a lawful permanent resident does not make an “entry” into the United States upon returning from an “innocent, casual, and brief” trip abroad. This Comment examines the meaning of the word “arrival” as used in the asylum filing deadline and argues that Congress has inadvertently created a new *Fleuti* debate over when travel outside the country is meaningfully interruptive of an asylum seeker’s presence in the United States. It further argues that federal courts have jurisdiction to consider the proper meaning of the word “arrival” in the one-year rule and should do so according to legislative intent, which was not to use the filing deadline to preclude legitimate refugees from seeking asylum in the United States.

Dinesh is from Nepal.¹ The son of a political activist, he lived in the United States from 1999–2005. Almost immediately upon returning to Nepal in 2005, Dinesh was kidnapped and beaten by Maoist rebels who opposed his father’s activities. They told Dinesh he would have to join the armed faction of their rebellion or be killed. In April of 2006, Dinesh escaped and fled to the United States. He was detained at the border, where he asked for asylum to stay in the United States. Although Dinesh filed his application for asylum within three months, Immigration and Customs Enforcement (ICE) claimed that Dinesh was ineligible because he did not seek asylum within one year of “arrival,” as required by law. ICE asserted that because Dinesh had lived in the United States previously, his return in 2006 was not an “arrival” under the asylum law. Instead, ICE contended Dinesh would have needed to apply within one year of his 1999 entry to be eligible for asylum.

1. Hypothetical scenario based on an actual case pending before an Immigration Judge in Seattle at this writing. Some identifying details have been changed to protect the confidentiality of the asylum seeker.

Under United States law, an alien² seeking asylum in this country has one year from the date of arrival to file an application for asylum with the United States Citizenship and Immigration Service (USCIS).³ Federal regulations clarify that the one-year deadline is calculated “from the date of the alien’s *last* arrival in the United States.”⁴ However, the word “arrival” is not defined in the one-year rule for asylum applications or elsewhere in the Immigration and Nationality Act (INA), the main body of U.S. immigration law.⁵

The Court of Appeals for the Second Circuit, the only federal court of appeals to squarely address the issue thus far, has concluded that not every border crossing is an “arrival” for purposes of the one-year deadline.⁶ The court held that an asylum applicant who had resided in the United States for nearly a decade did not “arrive” in the United States when he returned from a three-week visit to his home country taken pursuant to a grant of advance parole by immigration authorities.⁷ In a subsequent, unpublished decision, the Second Circuit noted with approval an Immigration Judge’s decision to disregard an asylum applicant’s claimed “last arrival” date when calculating the one-year deadline because the alleged arrival “followed a brief trip to Canada rather than a flight from persecution.”⁸

Congress imposed the filing deadline on asylum applications as part of the sweeping Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁹ IIRIRA also stripped the federal courts of jurisdiction to review claims relating to the timeliness of an

2. An “alien” is a person who is not a citizen or national of the United States. *See* 8 U.S.C. § 1101(a)(3) (2000).

3. Immigration and Nationality Act (INA) § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2000). The Immigration and Naturalization Service (INS) was abolished by the Homeland Security Act of 2002. Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (to be codified at 6 U.S.C. § 291(a)). Asylum applications are now adjudicated by USCIS, a part of the Department of Homeland Security. *Id.* § 451(b)(3) (to be codified at 6 U.S.C. § 271(b)(3)).

4. 8 C.F.R. § 208.4(a)(2)(ii) (2005) (emphasis added).

5. 8 U.S.C. §§ 1101–1537.

6. *See* *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 179 (2d Cir. 2006); *Lumaj v. Gonzales*, 174 F. App’x 606, 608 (2d Cir. 2006).

7. *Joaquin-Porras*, 435 F.3d at 179. Advance parole is a type of travel document issued by USCIS to permit certain aliens to re-enter the United States after traveling abroad. *See* 8 C.F.R. § 223; *see also* U.S. Customs & Border Patrol, Advance Parole, http://www.cbp.gov/xp/cgov/travel/id_visa/what_adv_parole/adv_parole.xml (last visited Jan. 13, 2007).

8. *Lumaj*, 174 F. App’x at 608.

9. Pub. L. No. 104-208, § 604(a), 110 Stat. 3009-690 (1996) (codified at 8 U.S.C. § 1158(a)).

asylum application.¹⁰ Congress intended the deadline to prevent aliens from asserting frivolous asylum claims as a defense after deportation proceedings had been commenced against them, or otherwise misusing the asylum system.¹¹ It did not intend the filing deadline to preclude bona fide refugees from seeking asylum.¹²

Many legitimate refugees do not plan to seek asylum when they first arrive in the United States.¹³ Some may pursue other legal immigration options first.¹⁴ Others may return to their home countries several times before making the difficult decision that the situation is too dangerous to permit returning home permanently.¹⁵ But for how long and for what purposes may an alien depart the United States such that the person makes a new “arrival” under the asylum law upon returning? In the absence of clear guidance from Congress, immigration officials and the courts must consider when a departure from the United States sufficiently interrupts the applicant’s presence in the United States so as to warrant a new “arrival” date upon return.

In the 1963 immigration law case *Rosenberg v. Fleuti*,¹⁶ the U.S. Supreme Court considered the plight of a lawful permanent resident (LPR)¹⁷ whose deportability turned on whether his return from a short visit to Mexico constituted an “entry” into the United States.¹⁸ The Court avoided deporting Fleuti by holding that an “innocent, casual, and brief excursion” is not “meaningfully interruptive”¹⁹ of an LPR’s presence in

10. 8 U.S.C. § 1158(a)(3). The REAL ID Act of 2005 conferred on the federal courts of appeal jurisdiction over “constitutional claims or questions of law.” See 8 U.S.C.A. § 1252(a)(2)(D) (West 2005); see also *infra* Part IV.A.

11. See Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, IMMIGR. BRIEFINGS, Aug. 2005, at 4.

12. See *id.* at 5.

13. See Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 GEO. IMMIGR. L.J. 95, 97 (1996) (“Contrary to a common misperception, asylum seekers typically do not enter the United States with the intent to apply for asylum.”).

14. *Id.* at 99–100.

15. See, e.g., *id.*; *Silva v. U.S. Att’y Gen.*, 448 F.3d 1229, 1234 (11th Cir. 2006) (noting that asylum seeker returned briefly to Columbia despite fear of persecution because she thought “things might be different”).

16. 374 U.S. 449 (1963).

17. “LPR” is defined at 8 U.S.C. § 1101(a)(20) (2000). LPRs are often referred to as “green-card” holders. See *Etuk v. Slattery*, 936 F.2d 1433, 1437 (2d Cir. 1991) (“[T]he green card is the most widely utilized and accepted means of proving LPR status.”).

18. *Fleuti*, 374 U.S. at 452–53.

19. *Id.* at 462.

the country and therefore does not require an “entry” upon return.²⁰ More than three decades of case law followed the *Fleuti* decision, in which the courts attempted to define an “innocent, casual, and brief excursion” on a case by case basis,²¹ before IIRIRA established a statutory framework for determining when an LPR who travels abroad must seek “admission” at the border.²²

This Comment argues that by failing to define the word “arrival” in the one-year rule for asylum applications, Congress has invited another *Fleuti* debate about when a return to the United States is an “arrival” for purposes of the filing deadline. Part I discusses the one-year rule and the legislative history behind the law. Part II examines the meaning of the word “arrival” and analyzes the Second Circuit’s recent decisions that an asylum seeker does not make an “arrival” upon returning from certain brief trips outside the country. Part III demonstrates the relevance of the *Fleuti* doctrine, which held that an LPR does not make an “entry” upon returning from “innocent, casual, and brief” excursions abroad. Part IV examines the federal courts’ jurisdiction to consider the proper interpretation of the word “arrival” in the one-year rule. Finally, Part V argues that courts should interpret the word “arrival” so as to discourage frivolous applications but not to prevent bona fide refugees from seeking asylum in the United States.

I. AN ASYLUM SEEKER MUST APPLY FOR ASYLUM WITHIN ONE YEAR OF ARRIVAL OR MEET CERTAIN EXCEPTIONS

Under international treaty and domestic law, the United States may not return a refugee to a country where he or she would face persecution.²³ In 1996, in order to address perceived abuses of the asylum process,²⁴ Congress created a rule requiring all asylum seekers to apply for asylum within one year of arriving in the United States.²⁵ The one-year deadline may be extended at the discretion of an immigration

20. *Id.*

21. See *Tineo v. Ashcroft*, 350 F.3d 382, 385 (3d Cir. 2003) (referring to “over three decades of practice based on the *Fleuti* doctrine”).

22. See 8 U.S.C. § 1101(a)(13)(C).

23. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268 (incorporating by reference the terms of the Convention Relating to the Status of Refugees, Apr. 24, 1954, 189 U.N.T.S. 2545).

24. See *Khandwala et al.*, *supra* note 11, at 4; see also PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 31–32 (2000).

25. 8 U.S.C. § 1158(a)(2)(B).

official for certain changed or extraordinary circumstances.²⁶ Legislative history shows that, while Congress wished to deter spurious claims, it did not intend to use the filing deadline to deny asylum to legitimate refugees.²⁷

A. Asylum Is a Form of Discretionary Relief Available to Refugees

As a signatory to the 1967 Protocol Relating to the Status of Refugees, the United States may not return a refugee to a country where his or her life or freedom would be threatened.²⁸ A refugee is a person who is outside his or her country of nationality and unable or unwilling to return home on account of a “well-founded fear” of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.²⁹ Any alien present in the United States or arriving at a port of entry may ask for asylum, regardless of whether he or she is in the country legally.³⁰ An alien who is found to meet the definition of a refugee and who is not ineligible on other grounds³¹ may be granted asylum.³² After one year, an asylee can apply to become a lawful permanent resident.³³

B. An Applicant for Asylum Must File Within One Year of Last Arrival or Show Changed or Extraordinary Circumstances

IIRIRA imposed a one-year filing deadline on all applications for asylum.³⁴ Effective April 1, 1997, an alien seeking asylum must show

26. *Id.* § 1158(a)(2)(D). This Comment uses the term “immigration official” to refer to an asylum officer, Immigration Judge, or the Bureau of Immigration Appeals (BIA).

27. *See infra* Part I.C.

28. Protocol Relating to the Status of Refugees, *supra* note 23, at 6223 (incorporating by reference the terms of the Convention Relating to the Status of Refugees, Apr. 24, 1954, 189 U.N.T.S. 2545). The Refugee Act of 1980 incorporated the treaty obligations into United States law. Pub. L. No. 96-212, § 94 Stat. 102, 107. Before that, refugees were permitted to stay on an ad hoc basis. *See* Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 7 n.36 (2001).

29. 8 U.S.C. § 1101(a)(42)(A).

30. *Id.* § 1158(a)(1).

31. An alien may be found ineligible for asylum if, for example, he or she is eligible to be removed to a safe third country, has been convicted of a particularly serious crime, or is found to be a “danger to the security of the United States.” *Id.* § 1158(b)(2)(A).

32. *Id.* § 1158(b)(1).

33. *Id.* § 1159(b).

34. *Id.* § 1158(a). The one-year deadline does not apply to withholding of removal. *See id.*

“by clear and convincing evidence” that the asylum application was filed within one year of the alien’s arrival in the United States.³⁵ Federal implementing regulations specify that the one-year period “shall be calculated from the date of the alien’s *last* arrival in the United States.”³⁶

In response to concerns that a time limit for asylum claims could be impracticable or onerous,³⁷ Congress authorized an exception to the deadline for applicants who can show “changed” or “extraordinary” circumstances.³⁸ A “changed circumstance” includes changes in conditions in the applicant’s home country that relate to the applicant’s eligibility for asylum, or the applicant’s delayed awareness of those conditions.³⁹ An “extraordinary circumstance” includes serious illness or disability that prevented the applicant from timely filing, including impairment caused by the effects of persecution or torture.⁴⁰ An alien who maintained lawful status (such as a student visa holder) until a reasonable time before filing the application may also qualify for an “extraordinary circumstance” exception.⁴¹ In all cases, the circumstances causing the delay must relate directly to the applicant’s failure to file the application on time and the application must be filed within a “reasonable time” thereafter.⁴² The decision to grant an exception for

§ 1231(b)(3). An Immigration Judge may grant withholding of removal to aliens who do not qualify for asylum but who can show that, on account of their race, religion, nationality, membership in a particular social group, or political opinion, it is more likely than not they would face persecution if returned to their home country. An alien awarded withholding of removal may live and work in the United States legally, but may not apply for legal permanent residence or bring family members to the United States. 8 C.F.R. § 208.16 (2005).

35. 8 U.S.C. § 1158(a)(2)(B). The phrase “last arrival” appeared in the final rule without commentary. Asylum Procedures, 65 Fed. Reg. 76,123–24 (Dec. 6, 2000) (codified at 8 C.F.R. § 208.4(a)(2)(ii)).

36. 8 C.F.R. § 208.4(a)(2)(ii) (2005) (emphasis added).

37. See Pistone, *supra* note 13, at 97–100 (listing numerous reasons why a refugee may delay filing for asylum, including unfamiliarity with asylum law, fear of retaliation for loved ones back home, desire to see if conditions in home country improve, and inability or unwillingness to revisit traumatic events).

38. 8 U.S.C. § 1158(a)(2)(D).

39. 8 C.F.R. § 208.4(a)(4).

40. *Id.* § 208.4(a)(5)(i).

41. *Id.* § 208.4(a)(5)(iv).

42. *Id.* § 208.4(a)(4)(ii), (a)(5). “Reasonable time” is a fact-specific inquiry, but in some situations appears to be significantly less than one year. See, e.g., Tsevegmid v. Ashcroft, 318 F.3d 1226, 1228 (10th Cir. 2003) (noting Immigration Judge’s conclusion that an asylum applicant who arrived on a student visa on February 10, 1998, lost his lawful status when he withdrew from university classes on April 15, 1998, and applied for asylum on February 16, 1999 did not file a timely application); *In Re Y-C-*, 23 I. & N. Dec. 286, 288 (B.I.A. 2002) (filing delay of five months

changed or extraordinary circumstances is entirely within the discretion of the immigration official adjudicating the application.⁴³

C. Congress Imposed the One-Year Deadline to Curb Fraudulent Applications but Did Not Seek to Preclude Legitimate Claims for Asylum

Congress created the one-year deadline in order to deter certain abuses of the asylum system.⁴⁴ Prior to IIRIRA, an alien could ask for asylum at any time after arriving in the United States.⁴⁵ In the 1990s, Congress became increasingly concerned that an alien facing deportation would assert an asylum claim as a defense, slowing the deportation process while the asylum grounds were assessed.⁴⁶ Congress was also aware that some aliens applied for asylum as a means of obtaining temporary work authorization.⁴⁷ Because the backlog of un-adjudicated asylum cases was quite long, an alien could file for asylum and remain in the country legally for several years, waiting for the application to be adjudicated.⁴⁸ Although 1994 Justice Department regulations expedited the adjudication process and required applicants to wait 180 days before receiving work authorization,⁴⁹ some lawmakers still claimed that too many applicants sought asylum for reasons unrelated to fleeing persecution.⁵⁰

While Congress acted to discourage frivolous applications, it did not intend to use the filing deadline to prevent legitimate refugees from applying for asylum.⁵¹ During floor debates, Senator Patrick Leahy

reasonable where minor asylum seeker was detained in INS custody for more than a year). *But see* Diallo v. Gonzales, 447 F.3d 1274, 1282 (10th Cir. 2006) (holding that an asylee whose asylum status has been terminated has one year from the date of termination to reapply).

43. 8 C.F.R. § 208.4(a)(2)(B).

44. *See* Khandwala et al., *supra* note 11, at 4.

45. *See* 8 U.S.C. § 1158(a) (1994).

46. *See* SCHRAG, *supra* note 24, at 31–32.

47. *See* SCHRAG, *supra* note 24, at 31–32; *see also* H.R. REP. NO. 104-469(1), at 116 (1996) (expressing concern about “visa overstayers” who file for asylum “as a means of remaining in the United States indefinitely”).

48. *See* SCHRAG, *supra* note 24, at 33. In 1992, the backlog stood at 244,000 applications. *Id.* at 45.

49. Employment Authorization, 59 Fed. Reg. 62,284 (Dec. 5, 1994) (codified at 8 C.F.R. § 208.7(a)).

50. *See* Khandwala et al., *supra* note 11, at 4.

51. *See* Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 269 (1997).

reminded his colleagues of “America’s traditional role as a refuge from oppression.”⁵² Senator Orrin Hatch, Chairman of the Judiciary Committee, stated of the one-year rule: “[I]f the time limit and its exceptions do not provide adequate protection to those with legitimate claims of asylum, I will remain committed to revisiting this issue in a later Congress.”⁵³ In a colloquy prior to the Senate vote, Senator Hatch further noted, “I am committed to ensuring that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies.”⁵⁴ Senator Spencer Abraham, Chair of the Senate’s Immigration Subcommittee, agreed that the one-year rule should not be used to deny protection to those with legitimate claims of persecution. He responded that he planned to “pay close attention” to how the one-year deadline is interpreted and revisit the issue if the rule fails to “provide sufficient protection to aliens with bona fide claims of asylum.”⁵⁵

II. U.S. IMMIGRATION LAW DOES NOT DEFINE “ARRIVAL”

Many ordinary words have a technical meaning in the immigration context.⁵⁶ Although neither IIRIRA nor the INA defines the word, “arrival,” it is clear that “arrival” is a different concept from “entry” or “admission.”⁵⁷ The event of an “entry” or “admission” into the United States entitles the alien to certain procedural due process rights under the Constitution before he or she can be removed from the country.⁵⁸ By comparison, the event of an “arrival” does not appear to trigger any enhanced due process rights and applies to those aliens who are physically within the United States, but have not yet “entered” or been “admitted” to the country.⁵⁹ The Court of Appeals for the Second Circuit has held that not every border crossing is an “arrival” for purposes of the

52. 142 CONG. REC. S11904 (daily ed. Sept. 30, 1996) (statement of Sen. Leahy).

53. 142 CONG. REC. S11492 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

54. 142 CONG. REC. S11840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch).

55. *Id.* (statement of Sen. Abraham).

56. See *Yuen Sang Low v. Att’y Gen.*, 479 F.2d 820, 821 (9th Cir. 1973) (stating “we are in the never-never land of the [INA], where plain words do not always mean what they say”).

57. See *infra* Part II.A.

58. See Gerald Seipp, *Law of Entry and Admission: Simple Words Complex Concepts*, IMMIGR. BRIEFINGS, Nov. 2005, at 1; see also Allison Wexler, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-Zadvydas*, 25 CARDOZO L. REV. 2029, 2032–34 (2004).

59. See *infra* Part II.A.

one-year rule.⁶⁰ The court reasoned that an alien's return to the United States after certain temporary trips abroad should not "reset the asylum clock" on the filing deadline.⁶¹

A. "Arrival" Is a Different Concept from "Entry" or "Admission"

In immigration law, the words "entry," "admission," and "arrival," are not synonyms and may not be used interchangeably. "Entry" and "admission" are legally significant terms, connoting the dividing line between those aliens who may be removed from the United States in exclusion proceedings and those who are entitled to deportation hearings with additional procedural benefits.⁶² Although IIRIRA revised the lexicon of immigration terminology,⁶³ the basic premise that the United States affords certain constitutional rights only to those categories of aliens it considers legally "within" its borders remains the same.⁶⁴

Not every physical crossing into the United States is an "entry" for purposes of immigration law. In *Matter of Pierre*,⁶⁵ the Board of Immigration Appeals (BIA) determined that an "entry" required three elements: (1) physical presence within the United States, (2) inspection and admission by an immigration officer or actual and intentional evasion of inspection at the nearest inspection point, and (3) freedom from official restraint.⁶⁶ This accepted construction of "entry" permitted some aliens to be treated as outside the United States, and thus outside

60. See *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 179 (2d Cir. 2006); *Lumaj v. Gonzales*, 174 F. App'x 606, 608 (2d Cir. 2006).

61. *Joaquin-Porras*, 435 F.3d at 180.

62. See *Landon v. Plasencia*, 459 U.S. 21, 25-27 (1982). Procedural benefits include advance notice of the charges being brought against the alien, opportunities for appeal, and potential eligibility for suspension of deportation.

63. See 8 U.S.C. § 1101(a)(13) (2000). The amended provision now reads, "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

64. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); *Chi Thon Ngo v. INS*, 192 F.3d 390, 395 (3d Cir. 1999) (Although there are still separate grounds of 'inadmissibility' and 'deportability,' the distinction [after IIRIRA] now turns on whether an alien has been 'admitted' to the United States, rather than on whether the alien has gained 'entry.'").

65. 14 I. & N. Dec. 467 (B.I.A. 1973).

66. *Id.* at 468 (finding that Haitian refugees taken into custody of the INS and later paroled into the custody of a group of local ministers while their application for asylum was pending never "entered" the country).

the protection of many of its laws, despite being physically within its borders.⁶⁷ For example, an alien placed in a detention facility upon arriving at a port of entry, although physically inside the United States, has not “entered” the country because he or she remains under official restraint.⁶⁸ Conversely, an alien who crosses into the United States without inspection has “entered,” despite being in the country unlawfully.⁶⁹

IIRIRA replaced the concept of “entry” with the concept of “admission.”⁷⁰ Prior to IIRIRA, any alien who effected an “entry” into the United States was entitled to deportation hearings; all other aliens were subject to exclusion proceedings.⁷¹ Because deportation hearings contain more procedural safeguards than exclusion proceedings, this construction of “entry” meant that an alien who “entered” the United States illegally received more due process rights than an alien apprehended at the border.⁷² An “admission” now requires a legal entry authorized by an immigration officer.⁷³ The primary effect of replacing “entry” with “admission” is that aliens who enter the United States illegally have not been “admitted” and are therefore no longer entitled to more procedural safeguards in removal proceedings than aliens apprehended at the border.⁷⁴

In contrast to the well-defined terms of “entry” and “admission,” the legal significance of an “arrival” must be gleaned from the statute, regulations, and legislative history. An “arrival” does not appear to entitle the alien to the same procedural due process rights as a pre-IIRIRA “entry” or a post-IIRIRA “admission.”⁷⁵ Federal regulations

67. See Seipp, *supra* note 58, at 6.

68. See *Sidhu v. Ashcroft*, 368 F.3d 1160, 1165 (9th Cir. 2004) (“Because [petitioner] was taken into custody in secondary inspection at LAX, she was never free from official restraint. Accordingly, she did not effect an entry and was not entitled to a deportation hearing.”).

69. See *Matter of A—*, 9 I. & N. Dec. 356, 357–58 (B.I.A. 1961) (finding stowaway who escaped from his vessel and remained in the country undetected for two years had made an “entry”).

70. IIRIRA § 301, 8 U.S.C. § 1101(a)(13) (2000).

71. See Seipp, *supra* note 58, at 6.

72. See *Landon v. Plasencia*, 459 U.S. 21, 25–27 (1982).

73. 8 U.S.C. § 1101(a)(13).

74. See H.R. REP. NO. 104-469, pt. 1, at 225 (1996); see also Wexler, *supra* note 58, at 2038 (“Until 1996, ‘entry’ constituted the dividing line between those aliens who received a constitutional right to procedural due process, and those who did not.”).

75. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1951) (“[A]liens who have once passed through our gates . . . may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of

define an “arriving alien” in pertinent part as “an applicant for admission coming or attempting to come into the United States.”⁷⁶ Although the INA does not define “arrival,” it distinguishes “arrival” from “entry” and “admission” in several places. For example, the INA declares that an alien with valid documentation “to enter the United States” may not enter if “upon arrival,” the alien is determined to be “inadmissible” for any reason.⁷⁷ The INA further states that an alien “who *arrives* in the United States . . . shall be deemed for purposes of this chapter an applicant for *admission*.”⁷⁸

An “arrival” for purposes of the asylum filing deadline appears to require only the first of the *Pierre* factors—physical presence within the United States.⁷⁹ The BIA has held that the clock on the one-year deadline starts running as soon as the alien appears at the border, even if the alien never “enters” or is “admitted” into the United States.⁸⁰ In *In Re Y-C-*,⁸¹ a fifteen-year-old boy from the People’s Republic of China arrived unaccompanied at a U.S. airport and was immediately placed in detention pending removal proceedings.⁸² Y-C- remained in the custody of the Immigration and Naturalization Service (INS) for over a year, until July 13, 1999, when he was paroled into the custody of an uncle.⁸³ Y-C- filed for asylum in May 2000, less than a year after his release from INS custody but more than a year after he was initially detained.⁸⁴ The BIA concluded, “[i]t is undisputed that the respondent filed his [asylum application] more than 1 year after his arrival in this country.”⁸⁵ Because Y-C- was in the custody of INS for more than a year, he never “entered” or was “admitted” into the country during the one-year window he had for filing his asylum application. His presence, however,

initial entry stands on a different footing . . .”).

76. 8 C.F.R. § 1.1(q) (2005). The regulation further clarifies that an alien paroled into the United States after 1997 remains an “arriving alien,” but an alien who returns pursuant to a grant of advance parole is not. *See id.*

77. 8 U.S.C. § 1185(d).

78. *Id.* § 1225(a)(1) (emphasis added).

79. 14 I. & N. Dec. 467, 468 (B.I.A. 1973).

80. *In Re Y-C-*, 23 I. & N. Dec. 286, 288 (B.I.A. 2002).

81. 23 I. & N. Dec. 286 (B.I.A. 2002).

82. *Id.* at 286, 288.

83. *Id.*

84. *Id.* at 286–87.

85. *Id.* at 287.

triggered the one-year asylum clock, even though Y-C- remained under official restraint.⁸⁶

Training materials used by USCIS indicate that the agency may consider any crossing into the United States an “arrival” for purposes of the one-year rule.⁸⁷ The Asylum Officer basic training manual addresses the situation of an alien who leaves and returns to the United States before applying for asylum. The manual states: “If an [asylum] applicant enters the United States on February 2, 2000, leaves the United States on February 25, 2000, and returns to the United States on March 1, 2000, the one-year period begins on March 1, 2000.”⁸⁸ While the training manual is not binding law,⁸⁹ it offers guidance into how the agency interprets its own regulations.⁹⁰

B. Presumably, Congress Intentionally Used the Word “Arrival” in the One-Year Rule Rather than “Entry” or “Admission”

Congress’s use of the word “arrival” in the asylum filing deadline is legally significant. Congress was cognizant of the meaning of the terms “entry” and “admission” because it replaced the definition of “entry” with “admission” in the same piece of legislation in which it imposed the asylum deadline based on the date of “arrival.”⁹¹ It is a basic rule of statutory construction that “the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”⁹² Therefore, Congress recognized that an “arrival” is not the same event as an “entry” or an “admission.”

86. *Id.* at 288. In this case, the BIA held Y-C- established “extraordinary circumstances” excusing his late filing. *Id.*

87. IMMIGRATION OFFICER ACADEMY, ASYLUM OFFICER BASIC TRAINING COURSE, at 4 (Nov. 30, 2001) available at http://www.asylumlaw.org/docs/united_states/one_year_lesson_March2001.pdf.

88. *Id.*

89. *See* Prokopenko v. Ashcroft, 372 F.3d 941, 944 (8th Cir. 2004) (agency not bound by internal operating instructions).

90. *See, e.g.*, Matter of Cavazos, 17 I. & N. Dec. 215, 217 (B.I.A. 1980) (noting INS Operations Instructions may be considered by an Immigration Judge or the BIA).

91. *See* 8 U.S.C. § 1101(a)(13) (2000); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.” (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

92. SEC v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003).

Congress presumably used the word “arrival” in the one-year rule in order to include those aliens who are present in the United States but who have never “entered” or been “admitted.”⁹³ Aliens may apply for asylum regardless of whether they are in the United States legally.⁹⁴ Replacing “arrival” with “admission” would preclude those aliens who entered the United States unlawfully from asking for asylum, because a lawful entry is required for admission.⁹⁵ Similarly, replacing “arrival” with “entry” would exclude those aliens apprehended at the border who ask for asylum: (1) at a port of entry, (2) while under official restraint, or (3) after being paroled into the country.⁹⁶ By using the word “arrival,” Congress signaled that any alien present in the United States or at the border may ask for asylum, regardless of his or her manner of entry or immigration status.

C. *The Second Circuit Holds That Not Every Border Crossing Is an “Arrival” for Purposes of the Asylum Filing Deadline*

To date, among the federal courts of appeals, only the Second Circuit has explicitly considered the meaning of the word “arrival” in the one-year asylum filing rule.⁹⁷ In *Joaquin-Porras v. Gonzales*,⁹⁸ the court held that a three-week trip abroad pursuant to a grant of advance parole by immigration authorities did not result in a new “arrival” date upon return.⁹⁹ In *Lumaj v. Gonzales*,¹⁰⁰ a subsequent unpublished decision, the court dismissed for lack of jurisdiction a portion of an asylum appeal relating to the timeliness of an asylum application.¹⁰¹ Before dismissing that portion of the case, the court noted that it agreed with the Immigration Judge’s decision to disregard the petitioner’s brief trip to

93. See Beth Lyon, *Fighting a Deadline on Fear: Asylum Practice Update as the One-Year Deadline Approaches*, 75 INTERPRETER RELEASES 285, 286 (Jan.–June 1998).

94. 8 U.S.C. § 1158(a)(1) (2000).

95. *Id.* § 1101(a)(13); see also *supra* Part II.A.

96. See, e.g., *Sidhu v. Ashcroft*, 368 F.3d 1160, 1165 (9th Cir. 2004); *Assa’ad v. U.S. Att’y Gen.*, 332 F.3d 1321, 1326–27 (11th Cir. 2003).

97. See *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 179 (2d Cir. 2006); *Lumaj v. Gonzales*, 174 F. App’x 606, 608 (2d Cir. 2006).

98. 435 F.3d 172 (2d Cir. 2006).

99. *Id.* at 179.

100. 174 F. App’x 606 (2d Cir. 2006).

101. *Id.* at 608. See *infra* Part IV for a discussion of the federal courts’ jurisdiction.

Canada when determining the date of the petitioner's "last arrival" to the United States.¹⁰²

In *Joaquin-Porras*, the court held that the petitioner's recent return from a visit to his home country was not his "last arrival" for purposes of his asylum claim.¹⁰³ Joaquin-Porras entered the United States lawfully in 1991 and resided in Ithaca, New York for nearly ten years except for a few brief visits to his home country of Costa Rica.¹⁰⁴ In 2000, he traveled to Costa Rica for three weeks after receiving advance parole to re-enter the United States.¹⁰⁵ He returned on January 27, 2000 and applied for asylum slightly less than a year later, on January 18, 2001.¹⁰⁶ The Immigration Judge rejected the application as untimely and the BIA summarily affirmed.¹⁰⁷ On appeal, the Second Circuit rejected Joaquin-Porras's argument that the Immigration Judge improperly refused to calculate his asylum deadline as one year from the date of his return from his most recent trip to Costa Rica.¹⁰⁸ While reasoning that an alien could make more than one "arrival," the court stated, "it is anything but self-evident that the phrase 'arrival in the United States' refers to any and all border crossings into the country."¹⁰⁹

The court noted that the phrase "last arrival in the United States" had appeared before, in a 1966 immigration statute.¹¹⁰ That statute provided for the adjustment of status for certain Cuban nationals based on the applicant's "last arrival" date.¹¹¹ The statute expressly stated that a temporary absence from the United States should be disregarded for purposes of calculating the "last arrival" date if the applicant departed "with no intention of abandoning his or her residence."¹¹² In the

102. *Lumaj*, 174 F. App'x at 608.

103. *Joaquin-Porras*, 435 F.3d at 179.

104. *Id.* at 175.

105. *Id.* Aliens awaiting adjustment of immigration status are generally advised to apply for advance parole before leaving the country. *See supra* note 7. At the time of his 2000 trip to Costa Rica, Joaquin-Porras was awaiting adjustment of his immigration status based on marriage to an American citizen. His spouse later admitted the marriage was fraudulent and withdrew the application for adjustment of status. *See Joaquin-Porras*, 435 F.3d at 174-75.

106. *Joaquin-Porras*, 435 F.3d at 175.

107. *Id.* at 174.

108. *Id.* at 178-79.

109. *Id.* at 179.

110. *Id.*

111. *Id.* (citing 8 C.F.R. § 245.2(a)(4)(ii)).

112. *Id.*; *see also* *Matter of Baez-Ayala*, 13 I. & N. Dec. 79, 82-83 (B.I.A. 1968) ("[A] subsequent arrival after a temporary absence from the United States with no intention to abandon

Joaquin-Porras decision, the court reasoned that the phrase “last arrival” in the federal regulations for the one-year filing deadline implicitly included such an exception.¹¹³ Concluding that *Joaquin-Porras*’s brief absence was undertaken with no intent to abandon his residence in the United States, the court found that his temporary absence should similarly be disregarded for purposes of determining his “last arrival” date.¹¹⁴

In reaching its decision, the court reasoned that “[p]ermitting applicants to reset the asylum clock by taking a short excursion abroad would undermine the one-year deadline’s clear purpose of focusing the asylum process on those who have recently fled persecution in their home countries.”¹¹⁵ Although *Joaquin-Porras* based his claim for asylum in part on an incident that occurred during his most recent visit to Costa Rica,¹¹⁶ the court determined that his temporary absence pursuant to advance parole did not warrant a new “arrival” date upon return.¹¹⁷ Instead, the court affirmed the Immigration Judge’s decision that April 1, 1997, the effective date of the regulation, was the proper starting point for the one-year deadline for those aliens present in the United States when IIRIRA was enacted.¹¹⁸

Similarly, in *Lumaj*, the Second Circuit noted with approval the Immigration Judge’s decision to disregard a short trip outside the United States when calculating the proper “last arrival” date on *Lumaj*’s application for asylum.¹¹⁹ The court dismissed the portion of *Lumaj*’s appeal regarding the timeliness of her application for lack of jurisdiction.¹²⁰ Before dismissing, however, the court concluded the Immigration Judge was reasonable in disregarding *Lumaj*’s claimed last

residence in the United States does not constitute the “last arrival” within [the 1966 Act].”).

113. *Joaquin-Porras*, 435 F.3d at 179.

114. *Id.*

115. *Id.* at 180.

116. *Id.* at 175. *Joaquin-Porras* sought asylum because of persecution in Costa Rica on account of his homosexuality. He claimed the police illegally detained and verbally assaulted him during his 2000 visit. The Immigration Judge declined to grant an exception for changed circumstances and the Second Circuit dismissed review of that portion of his appeal for lack of jurisdiction. *Id.* at 174–75.

117. *Id.* at 179.

118. *Id.* at 176, 179.

119. 174 F. App’x 606, 608 (2d Cir. 2006).

120. *Id.* The *Lumaj* court acknowledged its jurisdiction over issues of statutory interpretation, but found that *Lumaj* had not raised any such issue. See *infra* Part IV.

arrival date because that entry “followed a brief trip to Canada rather than a flight from persecution.”¹²¹

III. *FLEUTI* PERMITTED SOME ALIENS TO TRAVEL ABROAD WITHOUT MAKING A NEW “ENTRY” UPON RETURN

The problems encountered applying the concept of “arrival” to the one-year asylum deadline are familiar from other areas of immigration law. In the 1963 case of *Rosenberg v. Fleuti*, the U.S. Supreme Court concluded that an LPR does make an “entry” upon returning from an “innocent, casual, and brief” trip abroad.¹²² The Court reasoned that Congress did not intend to subject an LPR who takes a short trip outside the country to the same scrutiny at the border as an alien who does not have LPR status or an alien attempting to enter the United States for the first time.¹²³ Although Congress revised the concept of “entry” in IIRIRA,¹²⁴ the *Fleuti* doctrine remains useful as an example of the way seemingly straightforward terms like “entry” can present complicated issues in immigration law and should be construed according to legislative intent.

A. *Fleuti Held that an LPR Did Not Make an “Entry” when Returning from an “Innocent, Casual, and Brief” Excursion Abroad*

In *Fleuti*, the U.S. Supreme Court held that an LPR who left the country for an “innocent, casual, and brief” trip was not required to seek “entry” at the border upon return.¹²⁵ *Fleuti*, a Swiss national and LPR, visited Mexico for a few hours in 1956.¹²⁶ Three years later, the INS tried to deport *Fleuti* on the grounds that he had been inadmissible at the time of his 1956 “re-entry” into the United States because he was “afflicted with psychopathic personality” on account of his homosexuality.¹²⁷ Because Congress did not make homosexuality

121. *Lumaj*, 174 F. App’x at 608.

122. 374 U.S. 449, 462 (1963).

123. *Id.* at 461–62.

124. See 8 U.S.C. § 1101(a)(13)(A) (2000).

125. *Fleuti*, 374 U.S. at 462.

126. *Id.* at 450.

127. *Id.* at 450–51. *Fleuti* challenged these grounds as unconstitutionally vague and the Ninth Circuit agreed. *Id.* The U.S. Supreme Court avoided reaching the constitutional question by instead finding that *Fleuti*’s return from Mexico was not an “entry.” *Id.*

grounds for exclusion until after Fleuti's initial entry in 1952,¹²⁸ the question of Fleuti's deportability turned on whether his return from Mexico in 1956 could be characterized as an "entry."¹²⁹ If his 1956 border crossing was an "entry," that entry was an inadmissible entry and he could be deported on that basis. If his 1956 return was not an "entry," Fleuti was not inadmissible at the time of his 1952 entry, and therefore could not be deported on those grounds.¹³⁰

The Court examined the definition of "entry" in the INA to reach its decision that Fleuti's afternoon excursion was not so "meaningfully interruptive" of his stay in the United States as to require evaluating him for inadmissibility at the border.¹³¹ Until IIRIRA, the INA defined "entry" in pertinent part as "any coming of an alien into the United States *except*" that an LPR will not be regarded as making an "entry" if the LPR can show that "his departure . . . was not intended or reasonably to be expected . . . by him."¹³² The Court considered this "intent exception" written into the definition of "entry." It reasoned that an "unintentional" departure included one in which the LPR did not intend or evidence an intent to abandon his or her residency in the United States.¹³³ An "innocent, casual, and brief" journey, the Court concluded, should be treated for purposes of the immigration laws as not a departure at all.¹³⁴

B. *The Fleuti Court Examined Legislative Intent with Regard to "Entry"*

The *Fleuti* Court construed the "intent exception" in the definition of "entry" according to Congress's intent to mitigate the harsh consequences of requiring LPRs to seek an "entry" every time they returned to the United States from abroad.¹³⁵ Requiring an alien to make a new "entry" after every border crossing could result in severe consequences for two reasons. First, in some circumstances the grounds

128. The Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), did not become effective until three months after Fleuti entered the country. *See Fleuti*, 374 U.S. at 453.

129. *Fleuti*, 374 U.S. at 452–53 n.2.

130. *Id.*

131. *Id.* at 462.

132. INA § 101(a)(13) (emphasis added).

133. *Fleuti*, 374 U.S. at 462.

134. *Id.*

135. *Id.* at 458.

for exclusion were broader than the grounds for deportation.¹³⁶ Thus, in 1956, someone like Fleuti could be excluded from entering the United States for being a homosexual, but could not be deported on the same grounds.¹³⁷ Second, for aliens convicted of certain crimes, deportability frequently hinged on the number of years that elapsed between “entering” the country and committing the crime.¹³⁸ Under both of these circumstances, attempting to leave and re-enter the United States could result in removal for aliens who otherwise would not be subject to deportation.¹³⁹ Thus, a strict construction of “entry” essentially prevented certain aliens from ever setting foot outside the country if they wished to continue to reside in the United States.

Congress added the “intent exception” to the definition of “entry” in 1952,¹⁴⁰ in so doing, it noted with approval previous court decisions interpreting the word “entry” in a manner which spared LPRs from having to seek an “entry” following unforeseen or involuntary departures.¹⁴¹ For example, in 1947 the Second Circuit refused to uphold the deportation order of a longtime LPR when his train from Buffalo to Detroit passed, unbeknownst to him, through Canada in the middle of the night.¹⁴² The same year, the U.S. Supreme Court reversed the deportation order of an LPR who was taken to Cuba for a week to recuperate after his merchant ship was torpedoed in the Panama Canal during World War II.¹⁴³ In both cases, the alien had a criminal conviction which would render him deportable if the court applied a strict interpretation of “entry.”¹⁴⁴

In *Fleuti*, the Court noted that Congress added the “intent exception” to avoid unfairly subjecting LPRs to the “irrational hazards” caused by requiring an “entry” with every border crossing, regardless of the

136. See *Cabasug v. INS*, 847 F.2d 1321, 1323 (9th Cir. 1988) (“Many grounds for exclusion . . . are not grounds for deportation if they come into existence after lawful admission into the United States.”).

137. *Fleuti*, 374 U.S. at 460.

138. See, e.g., 8 U.S.C. § 1251(a)(2)(A)(i) (1994) (making conviction of a crime of moral turpitude within five years of entry (or 10 years for an LPR) a deportable offense).

139. See Michael D. Patrick, *The Diminution of the ‘Fleuti’ Doctrine*, N.Y.L.J., Mar. 23, 1998 at 3.

140. INA § 101(a)(13).

141. See *Fleuti*, 374 U.S. at 458.

142. *DiPasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947).

143. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

144. *DiPasquale*, 158 F.2d at 878; *Delgadillo*, 332 U.S. at 389–90.

circumstances surrounding the departure.¹⁴⁵ In light of the “momentous” interests at stake for LPRs, many of whom had lived in the United States since childhood, the *Fleuti* Court reasoned that Congress intended the “intent exception” to apply not only to unforeseen or involuntary departures, but to insignificant absences as well.¹⁴⁶ The *Fleuti* Court stated, “it effectuates congressional purpose to construe the intent exception . . . as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien’s permanent residence.”¹⁴⁷ The Court’s interpretation of the “intent exception” permitted LPRs to travel abroad without necessarily being subjected to the legal consequences of an “entry” upon return.¹⁴⁸

C. Congress Addressed the *Fleuti* Doctrine in IIRIRA

After *Fleuti*, the lower courts attempted to define an “innocent, casual, and brief excursion” on a case by case basis.¹⁴⁹ The *Fleuti* Court identified three factors it considered important when determining whether a trip abroad required the LPR to seek “entry” at the border: the duration of the excursion, the purpose of the excursion, and whether the excursion required the procurement of travel documents.¹⁵⁰ However, the Court noted that a complete list of relevant factors “remains to be developed by the gradual process of judicial inclusion and exclusion.”¹⁵¹ Ultimately, the lower courts determined that a trip abroad could be significantly longer than *Fleuti*’s and still not meaningfully interrupt the LPRs presence in the United States.¹⁵²

In IIRIRA, Congress replaced “entry” with “admission” and codified a portion of the *Fleuti* doctrine in a statutory framework for determining

145. *Fleuti*, 374 U.S. at 459.

146. *Id.*; see also Patrick, *supra* note 139, at 3.

147. *Fleuti*, 374 U.S. at 462.

148. *See id.*

149. *See* Tineo v. Ashcroft, 350 F.3d 382, 385 (3d Cir. 2003) (referring to “over three decades of practice based on the *Fleuti* doctrine”).

150. *Fleuti*, 374 U.S. at 462 (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877) (internal quotations omitted)).

151. *Id.*

152. *See, e.g.,* Jubilado v. United States, 819 F.2d 210, 214 (9th Cir. 1987) (finding that LPR’s return from three months in the Philippines to bring wife and children to the United States was not an “entry”); Itzcovitz v. Selective Serv. Local Bd. No. 6, 447 F.2d 888, 894 (2d Cir. 1971) (finding that LPR’s return from three-week business trip to Israel was not an “entry”).

when an LPR must seek “admission” into the United States.¹⁵³ The amended INA states that a returning LPR “shall not be regarded as seeking an admission” at the border unless he or she falls into one of six enumerated exceptions. Such exceptions include departing in a manner intended to abandon or relinquish LPR status or being absent from the United States for a continuous period of more than 180 days.¹⁵⁴ In 2003, the Court of Appeals for the Third Circuit held that the *Fleuti* doctrine did not survive the enactment of IIRIRA and the “innocent, casual, and brief” framework no longer applies to returning LPRs.¹⁵⁵ Nevertheless, the *Fleuti* doctrine remains important as an example of the way courts have addressed the issues raised by immigration laws that link consequences to the date of “entry.”

IV. FEDERAL COURTS HAVE JURISDICTION TO CONSIDER THE PROPER MEANING OF THE WORD “ARRIVAL”

Until recently, the federal courts lacked jurisdiction to review determinations related to the timeliness of an asylum application.¹⁵⁶ In 2005, Congress enacted the REAL ID Act, which states that provisions in IIRIRA limiting federal court jurisdiction should not be read as precluding review of questions of law.¹⁵⁷ Questions of law include issues of statutory interpretation.¹⁵⁸ The proper meaning of the term “arrival” in the filing deadline is an issue of statutory interpretation.¹⁵⁹ Therefore, where the meaning of the phrase “last arrival” is in dispute, the federal courts of appeal have jurisdiction to review the one-year deadline.¹⁶⁰

153. IIRIRA, Pub. L. No. 104-208, § 301(a), 110 Stat. 3009-575 (1996) (to be codified at 8 U.S.C. § 1101(a)(13)); see also H.R. REP. NO. 104-469, pt. 1, at 225–26 (1996) (stating that the revision “preserves a portion of the *Fleuti* doctrine” while intending “to overturn certain interpretations of *Fleuti*”).

154. 8 U.S.C. § 1101(a)(13)(C) (2000).

155. *Tineo v. Ashcroft*, 350 F.3d 382, 396 (3d Cir. 2003).

156. 8 U.S.C. § 1158(a)(3) (“No court shall have jurisdiction to review any determination of the Attorney General under [the one-year bar for asylum applications].”).

157. REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231, 302 (2005) (to be codified at 8 U.S.C. § 1252(a)(2)(D)).

158. See *Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 154 (2d Cir. 2006).

159. See *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 178 (2d Cir. 2006).

160. *Id.*

A. *The REAL ID Act Confers Jurisdiction over Issues of Statutory Construction in IIRIRA to the Federal Courts*

IIRIRA stripped the federal courts of jurisdiction to review any decisions related to the timeliness of an asylum application or the existence of changed or exceptional circumstances.¹⁶¹ The law states that “[n]o court shall have jurisdiction to review any determination” regarding the one-year filing deadline.¹⁶² The federal courts must dismiss challenges to an immigration official’s determination that an asylum seeker did or did not meet the burden of showing he or she filed the application within one year of arrival or qualified for an exception to the deadline for changed or extraordinary circumstances.¹⁶³

The jurisdictional landscape of the asylum filing rule changed in 2005 with the REAL ID Act.¹⁶⁴ Section 106(a) of the REAL ID Act conferred jurisdiction to the federal courts of appeal over “constitutional claims or questions of law.”¹⁶⁵ The statute did not specify what it considers to be a question of law. However, the REAL ID Act’s legislative history makes clear that Congress intended “questions of law” to include questions of statutory interpretation.¹⁶⁶ In enacting section 106(a) of the REAL ID Act, Congress was responding to the U.S. Supreme Court’s decision in *INS v. St. Cyr*,¹⁶⁷ which held that IIRIRA did not preclude federal district courts from hearing *habeas corpus* petitions brought by an alien in custody pursuant to an order of deportation.¹⁶⁸ The Court concluded that questions of law reviewable on *habeas* may not be limited without an express statement by Congress that it intended to preclude such review.¹⁶⁹ The Court stated that “a serious Suspension Clause issue would be presented” if the Court were to conclude that Congress had

161. 8 U.S.C. § 1158(a)(3) (2000).

162. *Id.*

163. *See, e.g., Chen*, 434 F.3d at 151 (dismissing a timeliness appeal for lack of jurisdiction and noting that “our sister circuits have uniformly recognized that we lack jurisdiction to review an asylum application that the BIA has deemed untimely or as to which the BIA has found neither changed nor extraordinary circumstances excusing the untimeliness”).

164. REAL ID Act, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (2005) (to be codified at 8 U.S.C. § 1252(a)(2)(D)).

165. 8 U.S.C.A. § 1252(a)(2)(D) (West 2005).

166. *See* H.R. REP. NO. 109-72, at 175 (2005) (Conf. Rep.).

167. 533 U.S. 289 (2001).

168. *Id.* at 297.

169. *Id.* at 299.

completely withdrawn *habeas* jurisdiction from the courts without providing an adequate substitute.¹⁷⁰

The REAL ID Act consolidated in the federal courts of appeal review over those issues historically exercised by district courts through *habeas*, including issues of statutory construction.¹⁷¹ The statute states that provisions in the INA which limit or eliminate judicial review shall not be construed as precluding review over “constitutional claims or questions of law” filed in a court of appeals.¹⁷² Thus, under the REAL ID Act, federal courts of appeal have jurisdiction to consider issues of statutory interpretation raised in petitions for review of asylum claims.¹⁷³

B. The Proper “Arrival” Date to Use in Calculating the One-Year Deadline Is a Question of Statutory Interpretation

The legal meaning of the word “arrival” in the one-year asylum deadline is a question of statutory interpretation, and as such is a question of law over which the federal courts have jurisdiction.¹⁷⁴ The proper date to use in calculating the beginning of the one-year period involves no exercise of judgment or executive discretion.¹⁷⁵ An applicant may have only one “last arrival” date. By analogy, in determining whether an alien met the requirements for a grant of discretionary relief based on a statutory time period, the Ninth Circuit stated, “Here, either the petitioner has been continuously present in the United States for ten years or the petitioner has not. As our answer to the question posed by this case turns solely upon statutory interpretation, we have jurisdiction.”¹⁷⁶ Similarly, which date is the legally significant “last

170. *Id.* at 305.

171. H.R. REP. NO. 109-172(1) at 175 (explaining that “the purpose of [§ 106] is to permit judicial review over those issues that were historically reviewable on *habeas*—constitutional and statutory-construction questions”), *cited in* *Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 154 (2d Cir. 2006).

172. REAL ID Act, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (2005) (to be codified at 8 U.S.C. § 1252(a)(2)(D)).

173. *See Chen*, 434 F.3d at 153; *Ramadan v. Gonzales*, 427 F.3d 1218, 1222 (9th Cir. 2005).

174. *See Joaquin-Porras v. Gonzales*, 435 F.3d 172, 178 (2d Cir. 2006) (“[T]he proper interpretation of the one-year deadline provision . . . is a question of law over which we have jurisdiction under the REAL ID Act.”).

175. *Lagandaon v. Ashcroft*, 383 F.3d 983, 987 (9th Cir. 2004).

176. The court was called on to answer whether the petitioner accrued ten years of continuous presence in the United States between May 14, 1987 and May 13, 1997, or whether he fell one day short. *Id.*

arrival” date turns on the construction of the word “arrival,” a non-discretionary question of law.¹⁷⁷

V. COURTS SHOULD INTERPRET “ARRIVAL” SO AS NOT TO DENY ASYLUM TO LEGITIMATE REFUGEES

The one-year rule for asylum applications leaves unanswered the question of whether every crossing into the United States is considered an “arrival” for purposes of the filing deadline.¹⁷⁸ In the absence of a clear definition, courts should interpret “arrival” according to legislative intent. Congress did not intend to preclude legitimate refugees from seeking asylum.¹⁷⁹ Therefore, it comports with legislative intent to presume an asylum seeker “arrived” in the United States if the excursion abroad was “meaningfully interruptive” of the previous stay. As with the *Fleuti* doctrine, the full list of relevant factors for evaluating multiple “arrivals” should be developed through the judicial process.

A. *The Meaning of “Arrival” Is Unclear*

Neither the asylum statute nor the federal regulations squarely address which date should be deemed the applicable “arrival” date where an alien applies for asylum after leaving and returning to the United States.¹⁸⁰ The use of the qualifier “last” in the federal regulations indicates that an alien could make more than one “arrival” into the United States.¹⁸¹ But it does not compel the conclusion that an alien is considered to have made an “arrival” with each and every crossing into the United States.¹⁸² By adopting the term “arrival” without including an explicit discussion of the “re-entry” problem, Congress invited the same type of analysis as developed under the *Fleuti* doctrine.

Recent case law indicates that the phrase “last arrival” is bound to go through the same interpretive process as developed under the *Fleuti* line of cases. In *Joaquin-Porras*, the Second Circuit held that an alien does not make an “arrival” when returning from a three-week trip abroad

177. See *Joaquin-Porras*, 435 F.3d at 178.

178. 8 U.S.C. § 1158(a)(2)(B) (2000); 8 C.F.R. § 208.4(a)(2)(ii) (2005).

179. See *supra* Part I.C.

180. 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 208.4(a)(2)(ii).

181. 8 C.F.R. § 208.4(a)(2)(ii).

182. *Joaquin-Porras*, 435 F.3d at 179.

taken pursuant to a grant of advance parole.¹⁸³ In order to effectuate congressional intent to focus asylum on those who have recently fled persecution, the Second Circuit also indicated that it would disregard an asylum seeker's "brief trip to Canada" when calculating the filing deadline.¹⁸⁴

B. Congress Did Not Intend to Preclude Legitimate Claims of Asylum

While Congress created the deadline in response to concerns about misuse of the asylum process, it did not intend to use the filing deadline as a way to deny protection to bona fide refugees.¹⁸⁵ Congress remained mindful of the United States' commitment to refugees under its international treaty obligations¹⁸⁶ and its longstanding role as a "refuge from oppression."¹⁸⁷ Lawmakers expressed concern that the one-year rule might be used to deny protection to those with legitimate claims of persecution.¹⁸⁸ Key supporters of the bill agreed that Congress should closely monitor implementation of the one-year rule to verify that those with genuine claims of asylum were not turned away because of "technical deficiencies" with their applications.¹⁸⁹ Therefore, it accords with legislative intent to construe "arrival" in a manner which minimizes the possibility that a legitimate asylum seeker will be denied review of the merits of their asylum application.

C. Construing a Limited Intent Exception into the Meaning of "Arrival" Best Comports with Congressional Intent

As the U.S. Supreme Court did in *Fleuti*, courts should construe "arrival" according to legislative intent.¹⁹⁰ In *Fleuti*, the U.S. Supreme Court reasoned that it effectuated congressional intent to construe "entry" to permit LPRs to return to the United States after "innocent, casual, and brief" trips abroad without the return constituting an

183. *Id.*

184. *Lumaj v. Gonzales*, 174 F. App'x 606, 608 (2d Cir. 2006).

185. *See supra* Part I.C.

186. *See supra* Part I.A.

187. 142 CONG. REC. S11904 (daily ed. Sept. 30, 1996) (statement of Sen. Leahy).

188. *See Khandwala et al.*, *supra* note 11, at 4.

189. 142 CONG. REC. S11840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch).

190. *Rosenberg v. Fleuti*, 374 U.S. 449, 457-62 (1963).

“entry.”¹⁹¹ This interpretation permitted LPRs to travel abroad without risking being denied permission to re-enter the United States upon return.¹⁹² Congress recognized that a strict application of “entry” could produce harsh or unintended consequences for LPRs, who have a vested interest in maintaining their permanent residency in the United States.¹⁹³ Likewise, courts should recognize the “momentous” interests at stake for aliens who may be refugees facing a return to persecution.¹⁹⁴

It comports with legislative intent to recognize two circumstances in which a return to the United States is not an “arrival” under the one-year rule. First, as the Second Circuit concluded, it would defeat the rule’s purpose to permit an asylum seeker to circumvent the filing deadline by traveling across the border for the sole purpose of “reset[ing] the asylum clock” on an asylum application.¹⁹⁵ In addition, because the federal regulations explicitly exclude those aliens returning to the country under a grant of advance parole from the definition of “arriving alien,”¹⁹⁶ the one-year rule should disregard short excursions undertaken pursuant to advance parole obtained prior to departure from the United States.¹⁹⁷

However, where an alien departs the United States in a manner intended to be “meaningfully interruptive”¹⁹⁸ of his or her stay in the United States, any subsequent return to the United States should be treated as a new “arrival.” Congress clearly recognized that an asylum seeker may make more than one “arrival” into the United States and intended only the last “arrival” to trigger the filing deadline.¹⁹⁹ Moreover, USCIS instructs its asylum officers to consider the most recent return as the “last arrival” date when the alien leaves and returns to the United States.²⁰⁰ Congress imposed the filing deadline primarily to prevent aliens from asserting spurious claims of asylum as a stalling

191. *Id.* at 462.

192. *Id.* at 462; *see also supra* Part III.B.

193. *Fleuti*, 374 U.S. at 456–58 (1963).

194. *Id.* at 458.

195. *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 180 (2d Cir. 2006).

196. 8 C.F.R. § 1.1(q) (2005).

197. In both of these circumstances, the asylum seeker could still seek a changed or extraordinary circumstances exception to the filing deadline. *See* 8 U.S.C. § 1158(a)(2)(D) (2000).

198. *Fleuti*, 374 U.S. at 462.

199. *Joaquin-Porras*, 435 F.3d at 179.

200. *See* IMMIGRATION OFFICER ACADEMY, *supra* note 87, at 4.

tactic when facing deportation.²⁰¹ It therefore accords with the rule's purpose to construe "arrival" to include any return to the United States where the alien previously departed with the intent to abandon or otherwise make a meaningful break with his or her residence in the United States.

VI. CONCLUSION

An alien has one year from the date of last "arrival" to apply for asylum. Neither IIRIRA nor the INA defines the word "arrival," but the Second Circuit has recently held that not every border crossing is an "arrival" for purposes of the one-year deadline. In a different context, the U.S. Supreme Court concluded that an LPR does not make an "entry" into the United States when returning from an "innocent, casual, and brief excursion" abroad. The Court reasoned that it effectuated congressional intent to disregard an LPR's brief absence when the LPR did not intend to abandon residency in the United States. Whereas the *Fleuti* doctrine evolved to the benefit of the LPR, the Second Circuit's decision to disregard certain types of travel when considering an asylum seeker's last "arrival" date works to the detriment of the asylum seeker. Regardless, the *Fleuti* doctrine is an obvious analogy for the way the concepts of "entry" and "arrival" present difficult issues in immigration law and should be interpreted to effectuate legislative intent.

Reading a limited "intent exception" into the meaning of "arrival" best comports with the congressional purpose behind the one-year deadline for asylum applications. Submitting a timely application is only the first hurdle for those seeking asylum. The asylum seeker still must prove that he or she is credible, qualifies as a refugee, and is not ineligible on other grounds. For Dinesh, who left the United States in 2005 intending to return to Nepal permanently, his subsequent return as a refugee should be treated as a new arrival under immigration law. Congress enacted the filing deadline to reduce the number of unfounded claims for asylum, but did not intend to preclude legitimate refugees from seeking asylum in the United States. Rejecting Dinesh's application as untimely because he previously lived in the United States demonstrates that the filing deadline is being applied in a manner contrary to congressional intent, and unfaithful to the goals of U.S. asylum policy.

201. See *supra* Part I.C.