REASSERTING THE RIGHT TO REPRESENTATION IN IMMIGRATION MATTERS ARISING AT PORTS OF ENTRY

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Authors note: 8 CFR was reorganized on Feb. 28, 2003. (*See* 68 Fed. Reg. 9828.) This regulation created a new 8 CFR Chapter V, EOIR (8 CFR §1001 *et seq.*), redesignated certain sections of Chapter I by adding 1000 to those sections, duplicated other sections from Chapter I in Chapter V, and added some new parts in Chapter V.

To aid readers, we have adopted AILA's style of indicating the duplicated sections by citing them with a bracketed "1". Thus, for example, 8 CFR §[1]292.5 connotes the section that appears as both §292.5 (coming within the ambit of the DHS/BCIS) and §1292.5 (coming within the ambit of EOIR).

"The first thing we do,
let's kill all the lawyers." [1]

For more than two decades preceding its recent demise, the Immigration and Naturalization Service (INS) maintained that applicants for admission to the United States in primary or secondary inspection at our nation's ports of entry[2] had no right to counsel unless taken into custody as the focus of a criminal investigation. The immigration bar has so far been

[1] Wm. Shakespeare, *Henry VI, Part 2*, Act 4, sc. 2, l. 76-7. Many people, lawyers among them, believe this quote to be anti-lawyer. However, context suggests otherwise. Would-be revolutionary Jack Cade is plotting to overthrow the government and is looking for suggestions from his co-conspirators as to means to eradicate the rule of law. Dick the Butcher responds, "The first thing we do, let's kill all the lawyers."

[2] Under the statutory scheme set out in the INA, an alien (a person not a citizen or national of the United States) is deemed to be seeking "entry" or "admission" into the United States if she "arrives" at a port of entry and has not yet been admitted by an immigration officer. *See* INA §235(a)(1) and 8 CFR §1001.1(q). Upon arrival, an alien is subject to "primary inspection," and potentially to "secondary inspection" as well. The INS has explained these procedures in the "Supplementary Information" that accompanies one of its implementing regulations at 62 Fed. Reg. 10312, 10318 (1997) as follows:

> All persons entering the United States at ports-of-entry undergo primary inspection. . . . In FY 96, the Service conducted more than 475 million primary inspections. During the primary inspection stage, the immigration officer literally has only a few seconds to examine documents, run basic lookout queries, and ask pertinent questions to determine admissibility and issue relevant entry documents. . . . If there appear to be discrepancies in documents presented or answers given, or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection, the person must be referred to a secondary inspection procedure, where a more thorough inquiry may be conducted. In addition, aliens are often referred to secondary inspection for routine matters, such as processing immigration documents and responding to inquiries.

unsuccessful in challenging this contention, and the Service position has become part of the accepted culture surrounding the border processing of immigration matters.

Lawyers accompanying clients to the border for processing of a variety of immigration-related matters ranging from applications for humanitarian parole to processing of NAFTA-related immigration matters are regularly advised that their clients are not entitled to counsel at secondary processing.[3] Clients being processed for expedited removal are routinely denied the right to call a lawyer when asked to sign documents prepared by border officials that contain statements that may effectively bar them from entering the United States for a lifetime.

Sometimes the denials of representation are courteous, but at some ports of entry they are made with a hostile and dogmatic: "We do not allow lawyers here!" While such denials clearly reflect the culture surrounding border processing of immigration matters, the legal basis underlying the denial of counsel at the border is ripe for challenge.

Last year, a dramatic transformation took place at our nation's borders. On March 1, 2003, the border inspection functions of the INS, the U.S. Customs Service, and the Animal and Plant Health Inspection Service, as well as the border enforcement functions of the U.S. Border Patrol, were transferred to a newly created Bureau of Customs and Border Protection (CBP) within the Border and Transportation Security Directorate (BTS) of the Department of Homeland Security (DHS). With in excess of 35,000 federal employees, CBP is responsible for border enforcement, protection, and inspection at and between the more than 300 ports of entry into the United States.

It is obvious that the tragic events of September 11, 2001, will play a major role in shaping the values of the new agency, as CBP is charged with providing security at United States borders. However, CBP is also charged with the facilitation of the flow of legitimate people and goods across these borders, and the culture that will evolve within that agency as a means of achieving this goal remains to be seen.

Applicable law supports the proposition that a right to representation exists in many immigration related matters arising at the border. However unless this right is vigorously asserted, it seems clear that the culture regarding processing of immigration matters before CBP will incorporate the INS assertion that the right to representation does not apply to a person who is being processed through primary or secondary inspection at a port of entry.

This paper examines the various laws, regulations, and administrative positions pertaining to the right of representation in immigration related matters arising at the border. Portions of these provisions that may not readily be available to the reader are set out in the discussion.

AUTHORITIES

Statutes

- Immigration and Nationality Act (INA) §292

INA §292 is the primary statutory reference in the Act to the right to counsel.[4] The statute refers only to a person's "privilege" of representation, at no expense to the government, in removal proceedings before an immigration judge and in appeal proceedings before the Attorney General from any such removal proceedings. It is silent as to other situations to which a right to counsel may attach.

- Administrative Procedure Act (APA)[5]

The Administrative Procedure Act provides generally that both a party to an agency proceeding and a person compelled to appear before a federal agency are entitled to be represented by counsel or a qualified representative. Specifically, 5 USC §555(b) contains expansive language assuring a

[3] See e.g., August 28, 2003 letter from Michael P. Ambrosia, CBP Director of Field Operations, Buffalo, to Upstate New York AILA Chapter Chair Mark Kenmore, reproduced at 8 Benders Immig. Bull. 1773 (Nov 15, 2003). The letter advises, "…effective immediately, attorneys will no longer be allowed to assist their clients at the secondary inspections counter, unless requested by the inspection officer." According to the letter, the action was taken, in part, "…to increase security at our ports of entry." However, the letter does not expound on how such bar increases port security.

[4] References to the right to counsel are also found in the Act at §208(d)(4), §238(a)(2), §238(b)(2)(B), §239(a)(1)(E), §239(a)(2)(A), §239(b), §240(b)(4)(A) and §504(c)(1). These references essentially reiterate a privilege of representation at no expense to the government in removal proceedings. Like INA §292, the references are silent as to other situations to which a right to counsel may attach.

[5] Pub. L. 79-404, §6(a), 60 Stat. 237 (1946).

right to representation, except as otherwise set out in the subchapter, in administrative matters before agencies of the United States.[6] The APA does not contain any exceptions that infringe upon the right to counsel in immigration matters at the border.

- The Homeland Security Act of 2002.[7]

Section 101(b)(1) of the Homeland Security Act of 2002 sets out the seven components that comprise the primary mission of DHS. Subparagraph (F) affirmatively establishes that an integral part of DHS's primary mission is to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland…"

Regulations

- 8 CFR §[1]292.5.

This regulation affirms a broad right of representation in immigration matters generally. However, the final sentence of §292.5(b) provides that "[n]othing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody."

- Customs Regulations.

The rules of the former U.S. Customs Service contain no prohibitions regarding representation in Customs matters at the border.

Instructions

- *Inspectors Field Manual*, §2.9, Dealing with Attorneys and Other Representatives

The Inspectors Field Manual addresses the right to representation at the border, and indicates that in most cases representation is at the option of the inspecting officers.[8]

- *Adjudicators Field Manual*, Chapter §12.1.

The Adjudicators Field Manual does not provide comprehensive treatment or add any depth to a discussion of the right to representation at the border. It reads in relevant part:

> An alien does not have a right to representation during primary or secondary inspection when he or she is seeking admission to the United States. In all other matters, you should allow an alien to seek counsel to the extent that doing so does not hinder or unduly delay the adjudicative process.

Case Law

Surprisingly, given the number of inspections that take place at the nation's borders annually,[9] there is no binding case law dealing with the right to counsel at primary and secondary inspection.

The Fifth Amendment mandates due process in removal hearings that entitles aliens to the counsel of their own choice at their own expense.[10] Further, in the Sixth and Ninth Circuits, it is clear that arriving aliens do have constitutional rights in certain circumstances. [11]

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[6] 5 USC §555(b) provides:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

[7] Pub. L. No. 107-296. 116 Stat. 2135 (Nov. 25, 2002).

[8] IFM §2.9 reads as follows:

> No applicant for admission, either during primary or secondary inspection has a right to be represented by an attorney—unless the applicant has become the focus of a criminal investigation and has been taken into custody. An attorney who attempts to impede in any way your inspection should be courteously advised of this regulation. This does not preclude you, as an inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action. A more comprehensive treatment of this topic is contained in the *Adjudicator's Field Manual*, Chapter 12, and 8 CFR 292.5(b).

[9] In FY2003 DHS and its predecessor agency the INS conducted 427,684,262 inspections. See http://uscis.gov/graphics/shared/aboutus/statistics/msrsep03/INSP.HTM.

[10] See *Rios-Berrios v. INS*, 776 F.2d 859 (9th Cir. 1985).

[11] See *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) and *Guo XI v. INS*, 298 F.3d 832 (9th Cir. 2002) (ar-

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Nonetheless, in respect to counsel at the border, one lower court has opined:

> Plaintiffs claim that the Attorney General's Interim Regulations and the agency's policies contradict Congress's intent to provide fair procedures in the expedited removal system by denying aliens access to counsel at the secondary inspection stage. As with plaintiffs' claim regarding consultation with family and friends, the Attorney General could reasonably decide to limit an alien's opportunity for consultation with counsel to the time between secondary inspection and a credible fear interview. Because the statutory language is ambiguous in that it provides for consultation "prior to" the credible fear interview, but does not define the contours of that time period, the Court concludes that the Attorney General's decision to ban an aliens' access to counsel during the secondary inspection stage is reasonable in view of Congress's dual purposes in providing fair procedures while creating a more expedited removal process. [12]

However, as developed later in this paper, a constitutional right to access to counsel at the border may exist in immigration matters in which a U.S. business, citizen or permanent resident has an interest.

DISCUSSION

Through 8 CFR §[1]292.5, the government has affirmed a generally broad right of representation to individuals in immigration matters. The proviso quoted above expressly stating that there is no right to counsel during admission "unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody" was added by the INS in 1980.

This denial of right to counsel was orchestrated through an amendment to §292.5 in the form of a Final Rule[13] that was made without solicitation of comments on the grounds that "notice of proposed rule making is not required because the amendment is interpretative of an existing rule and clarifies any possible ambiguity."

The *Federal Register* posting indicated that the right of representation is superfluous at primary or secondary inspection because decisions of immigration officers are subject to review. Specifically the *Federal Register* posting states:

> The right of representation does not apply to a person who is being processed through primary or secondary inspection at a port of entry. … If upon inspection the immigration officer is satisfied that the applicant is entitled to enter he has authority to grant admission to the United States. While the inspector has authority to admit an applicant for entry, he is not authorized to finally bar the alien. … Subsequent administrative proceedings will determine whether or not an alien is admissible or excludable and it is at this point that the alien has the right to representation.

Other than the above, the *Federal Register* posting does not contain any further discussion as to how the rule change can be justified in light of the Administrative Procedure Act's assurance of a right to representation in administrative matters as set forth in 5 USC §555(b).

Expedited Removal

Assuming for purposes of discussion that the 1980 rule change could be squared with the APA at the time the rules change was made because of the right to a subsequent proceeding regarding questions of alleged inadmissibility, such justification has evaporated in light of provisions contained in Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA),[14] the anti-immigrant "reform" package enacted into law in 1996.

IIRAIRA created a new proceeding called "expedited removal" (sometimes referred to as "summary exclusion").[15] Effective April 1, 1997, all aliens (with the exception of lawful permanent residents) undergoing primary and secondary inspection at U.S. ports of entry are potentially subject to this proceeding.[16]

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riving aliens may not be detained indefinitely after being ordered removed).

[12] *AILA v. Reno*, 18 F. Supp. 2d 38, 55 (D.D.C. 1998). This quoted language is dicta, as the holding of *AILA v. Reno* ultimately turned on standing. Nonetheless it is noteworthy in that the Court failed to find the denial of counsel at the border to be unfair.

[13] 45 Fed. Reg. 81733 (Dec. 12, 1980).

[14] Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.

[15] INA §235(b)(1)

[16] On August 11, 2004, the Department of Homeland Security (DHS) announced expanded use of expedited removal

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Expedited removal is a method for turning away at a port of entry arriving aliens that the government alleges have made a material misrepresentation in the entry process or who lack required documentation for entry.[17] Using this draconian procedure, a CBP inspector can bar an alien from entering the United States for five years or life depending on the particular grounds alleged in the case. The order of expedited removal is prepared by the inspecting officer and is subject only to a review by his supervisor, who must concur with the decision for the removal to be effective.

Expedited removal at the border has been implemented expansively. For example, 8 CFR §[1]235.3(b)(4) allows its use against asylum applicants who allegedly fail to articulate a fear of persecution if removed from the United States. And as the following discussion of the demise of the right of appeal in TN adjudications for Canadian citizens illustrates, the government has not balked at using expedited removal proceedings as a means of preventing subsequent administrative review of adjudication of petitions for business entry to the United States that are adjudicated in secondary inspection.

TN Status

Canadian citizens seeking initial TN status in the United States must make application for this benefit in person before DHS personnel stationed at major ports of entry to the United States. These applications are adjudicated in secondary inspection.

A letter from the prospective U.S. employer and evidence of the applicant's qualifications generally supports applications for TN status. Regulations specify certain job details that must be affirmed in the letter and it is important that the position offered corresponds closely to the required professional qualifications. Applications for TN status may involve a number of complex issues depending on the facts and circumstances in a particular case.

Prior to May 25, 2001, the government's denial of TN status for a Canadian applicant at the border was subject to review by an immigration judge. The request for a hearing was the equivalent of an appeal or a reconsideration of the admitting officer's decision.[18]

However on May 25, 2001, INS headquarters issued instructions to the field to place Canadian TN applicants into expedited removal in cases where the inspecting officer does not believe the applicant to be eligible for the TN status sought and the applicant declines to withdraw the application for admission.[19] In such cases the inspecting officer effectively imposes a five-year bar to admission to the United States, with no right to administrative or judicial review. This hard-line approach has become a tactic used by the government to protect restrictive adjudication in TN matters from any formal review process.

Documentary deficiencies, legitimate disagreements over interpretation of regulations governing business entry, failure to articulate a credible fear of persecution, and the question as to what constitutes a material misrepresentation are all issues that can arise in primary or secondary inspection at the border and can lead to expedited removal. And all are topics on which an attorney (if allowed at the border) could provide valuable assistance, not only to the applicant for entry but also to the CBP inspector.

Customs Matters

The U.S. government has not propagated rules barring representation in customs matters arising at the border, and it is not anticipated that CBP will suggest such a rule, as there are no allegations that they hinder or unduly delay the process. Attorneys and customs brokers (representatives authorized by Customs regulation) frequently provide valuable onsite assistance in the clearance of goods at the border, a reality that is readily acknowledged (and appreciated) by government officials engaged in this process.

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proceedings by applying these proceedings to certain noncitizens apprehended within the United States, if they are apprehended within 100 miles of the border. See 69 Fed. Reg. 48877 (August 11, 2004). Many of the points made below regarding the use of expedited removal proceedings at the border apply equally to the use of expedited removal proceedings within the United States.

[17] INA §212(a)(6)(C).

[18] Chapter 15.5 of the Inspectors Field Manual, drafted prior to the implementation of the IIRAIRA stated "In the event a Canadian citizen applying for admission pursuant to NAFTA cannot demonstrate to the admitting officer that he or she satisfies the TN documentary requirements, the Canadian citizen should be offered a hearing before and immigration judge…The request for a hearing is equivalent to a TN appeal or reconsideration of the admitting officers decision."

[19] INS Headquarters mem. 70/6.2.2 (May 25, 2001). AILA members will find the memo posted on AILA InfoNet, Doc. No. 01070231 (July 2, 2001).

In fact, the "culture" surrounding customs clearance at the border is such that CBP will actually invite a party's customs broker or legal representative to attend and advise at processes such as NAFTA verifications (determinations whether goods are entitled to NAFTA treatment for purposes of customs assessment).[20] This happens because the broker or legal representative can generally articulate answers to questions that arise more clearly than can the importer/exporter.

The INS comments published in the *Federal Register* with its rule prohibiting representation at primary and secondary inspection did not suggest that attorneys impede the inspections process. And since the publication of the rule, border processing has become increasingly complex. Attorneys with knowledge of immigration law are uniquely situated to provide valuable on-site assistance in the entry process similar to the assistance provided by attorneys and customs brokers regarding the entry of goods.

APA

The entry process at the border constitutes an "agency proceeding" for purposes of the Administrative Procedures Act. The term "agency proceeding" is defined as an "agency process for the formulation of an order," 5 U.S.C. §551(12), (7), and an "order" is defined, in turn, as "a final disposition . . . of an agency in a matter other than rulemaking . . ." 5 U.S.C. §551(6). This is clearly broad enough to include the decisions made by DHS officers at the border to refuse to admit a person into the United States, or to issue an expedited removal order against a person, or to deny the issuance of a nonimmigrant visa.

Consequently, a person who is seeking admission to the United States and who is the "party" in the entry process is entitled to be represented by an attorney. According to the APA:

> A party is entitled to appear . . . with counsel . . . in an agency proceeding.

5 U.S.C. §555(b). The "agency process" includes both primary and secondary inspection, and therefore by statute counsel should be entitled to appear if the person subject to the proceedings requests representation.

Furthermore, part of DHS's congressional mandate charges the new agency with ensuring "that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland…" Border policies that allow Canadian professionals with the "wrong" degrees, in the view of a CBP inspector, to be arrested, interrogated, processed for "removal from the U.S.," at the border, and banned from future travel to the United States for five years, with no right to counsel, clearly have a chilling effect on business entry. Such a scenario clearly provides an economic argument that favors a right to counsel at the border.

Due Process

Moreover, in addition to the above statutory and policy arguments, a constitutional right to access to counsel in many immigration matters at the border may also exist. In considering whether and to what extent individuals have a constitutional right to representation in immigration matters at the border, it should be noted first that any such right does not arise under the Sixth Amendment, or pursuant to constitutional principles that apply when a person is prosecuted in criminal proceedings.

From their earliest decisions on the subject, courts have held that exclusion or deportation is not a matter of punishment for a criminal offense, but is merely a civil and remedial measure. As the Supreme Court prominently asserted in the final decade of the Nineteenth Century:

> [An immigration proceeding] is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain in the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation ... has determined that his continuing to reside here shall depend.[21]

[20] The standard CBP NAFTA verification letter in use at Blaine, WA advises, "In addition to legal counsel or other advisors, you have the right to have two observers present during this visit." (Copy of letter in possession of the authors.)

[21] *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

Since that time courts have, not entirely without cavil, followed that principle.[22] Thus, any asserted constitutional right to representation at the border will arise not from constitutional principles that apply in criminal proceedings, but from principles of Due Process.

However, it is often asserted that non-citizens at the border seeking entry into the United States have no Due Process rights.[23] This view, which is based on the so-called "plenary power" doctrine, the doctrine that Congress and the executive branch exercise plenary and virtually unfettered power when it comes to regulating immigration, has been the subject of wide spread criticism.[24]Nevertheless, it does hold sway with at least some courts and must be taken into account.

For constitutional purposes, United States law has traditionally distinguished between non-citizens at the border seeking entry and non-citizens within our borders seeking to remain in the United States. As the Supreme Court has described it, the deportation hearing is the usual means of proceeding against an alien already physically within U.S. borders, and the exclusion hearing is the usual means of proceeding against a person outside the United States seeking admission.[25] With some exceptions,[26] a person seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his or her application, for the power to admit or exclude non-citizens is a sovereign prerogative.[27]

However, once a person gains admission to our country and begins to develop the ties that go with permanent residence, that person's constitutional status change accordingly.[28] Thus, the courts have adopted the rule that non-citizens who are in the United States cannot be deported from the United States except in accordance with procedures that are consistent with Due Process.[29]

So, can it be argued that individuals at the port of entry have a constitutional Due Process right to be represented by an attorney? It may be difficult to convince a court that a first-time entrant seeking admission to the United States has a constitutional right to counsel with respect to his or her application for admission. In other words, government officials at the border may be able to inspect and turn away a non-citizen without any constitutional obligation to allow the person an opportunity to consult with an attorney.[30]

But that is not the end of the matter. Much more goes on at the border than merely the inspection and turning away of first time entrants. In many cases, the person attempting to reenter is a lawful permanent resident of the United States, and the constitutional status of these individuals is different from that of first-time entrants. Lawful permanent residents at the border who are returning from a brief trip abroad are treated, as a constitutional matter, as

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[22] See, e.g. R. Pauw, "A New Look at Deportation as Punishment: Why at least Some of the Constitution's Criminal Procedure Protections Must Apply", 52 Admin L.Rev. 305, 308, n. 8 (2000).

[23] See, e.g. *Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law"); *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1218 (9th Cir. 2002) ("an alien in exclusion proceedings ... has no procedural due process rights regarding his admission or exclusion...").

[24] See, e.g. David A. Martin, "Due Process and Membership in the National Community: Political Asylum and Beyond", 44 U.Pitt.L.Rev. 165, 173-180 (1983); T. Alexander Aleinikoff, "Aliens, Due Process, and 'Community Ties': A Response to Martin", 44 U.Pitt.L.Rev. 237, 237-239, 258-260; Robert Pauw, "Plenary Power: An Outmoded Doctrine that Should Not Limit IIRIRA Reform," 51 Emory L.J. 1095 (2002).

[25] *Landon v. Plasencia*, 459 U.S. 21, 25 (1982).

[26] See, e.g. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (holding that a lawful permanent resident returning to the United States after a brief, casual and innocent departure is not

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"seeking admission" but should be treated as if continuously physically present in the United States).

[27] *Landon v. Plasencia*, 459 U.S. at 32.

[28] Id.

[29] See, e.g. *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903); *Bridges v. Wixon*, 326 U.S. 135, 153-154 (1945).

[30] As noted above, on August 11, 2004 DHS announced that expedited removal proceedings will be applied to certain individuals who are apprehended within the United States. Even if individuals who are stopped at the border are not protected by the Due Process Clause, individuals inside the United States subject to expedited removal proceedings certainly do have Due Process rights. See note 29, supra. Arguably, their Due Process rights include the right to be represented by counsel.

if they have maintained continuous physical presence in the United States.[31]

These individuals are protected by procedural due process, and they arguably do have a constitutional right to representation at the border. Furthermore, statutory and regulatory provisions do not override the Constitution. In particular, the statutory amendments made by IIRIRA to §101(a)(13) do not affect a person's constitutional rights.[32] DHS has argued that under §101(a)(13), as a statutory matter, a lawful permanent resident who is returning to the United States will be deemed to be outside the United States "seeking admission" if one of the six conditions listed in that section applies.[33] However, even if that position is correct,[34] a returning lawful permanent resident is still protected by procedural Due Process.[35] A lawful permanent resident does not lose a constitutional right to counsel at the border simply because he or she is "seeking admission" according to the statute.

Many decisions at the border affect U.S. citizens and U.S. businesses. Although a non-citizen seeking entry into the United States may not have Due Process rights, U.S. citizens and businesses clearly do.[36] For example, in Israel v. INS,[37] regarding the marriage of a U.S. citizen and a non-citizen spouse, the Ninth Circuit stated without qualification: "The right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause".[38]

It is clear that U.S. citizens and U.S. businesses have significant interests in the issuance of visas, including family visas, TN-visas, L-visas, and other employment-related visas, for the benefit of family members, workers, and other non-citizens seeking admission into the United States. When a DHS official makes a decision at the border affecting this interest, the U.S. citizen or U.S. business arguably has a constitutional right to be represented by counsel. No case holds that an attorney cannot appear in a proceeding at the border on behalf of a U.S. citizen spouse or U.S. business to represent the citizen's interest.

Furthermore, many decisions at the border go beyond merely turning away an applicant for admission. In many cases, the proceeding is designed to penalize the applicant.[39] For example, in expedited removal proceedings under §235, the applicant is not just turned away, but in addition the government's goal is to penalize the applicant by barring him or her from reentry into the United States for five years

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[31] See *Kowng Hai Chew v. Colding*, 344 U.S. 590 (1953).

[32] See IIRAIRA, § 301

[33] See *Matter of Collado*, 21 I&N Dec. 1061 (BIA 1998).

[34] There is also a strong argument to the contrary, that LPR's at the border should not be regarded as seeking admission if the departure was "brief, casual and innocent". See dissent in *Collado*, 21 I&N Dec. 1061 (BIA 1997); *Richardson v. Reno*, 994 F.Supp. 1466 (S.D.Fla. 1998), rev'd on other grounds, 162 F.3d 1338 (11th Cir. 1998) (amended opinion).

[35] See, e.g. *Kwong Hai Chew*, 344 U.S. at 601.

[36] See, e.g. *Kleindienst v. Mandel*, 408 U.S. 753, 764-765 (1972) (recognizing that U.S. professors have constitutionally protected First Amendment rights to bring in non-citizens for academic purposes); *Fiallo v. Bell*, 430 U.S. 787, 794-795 (1977) (accepting that U.S. citizens have constitutionally protected rights to live with family members, and reviewing the statute to determine whether there is a "facially legitimate and bona fide reason" for the exclusion of a family member). Some courts have held that the "facially legitimate and bona fide reason" standard is a rational basis standard. See, e.g. *Blackwell v. Thornburgh*, 745 F.Supp. 1529, 1536 (C.D.Cal. 1989) ("Fiallo involved [an Equal Protection] constitutional challenge.... The Court applied a rational basis analysis").

[37] *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986).

[38] *Israel v. INS*, 785 F.2d at 742, n. 8. See also *Lesbian/Gay Freedom Day Comm. v. INS*, 541 F.Supp. 569, 583-588 (N.D.Cal. 1982) (INS policy of excluding homosexuals violates plaintiffs' constitutional rights of freedom of speech and association), vacated in light of INS's change in policy sub nom. *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983); *Morrison v. Jones*, 607 F.2d 1269, 1276 (9th Cir. 1979), cert. denied 445 U.S. 962 (1980) (court recognizes §1983 action by mother against county for interference with constitutional right to live with her minor son, where county took custody of the child and transported him to his grandparents in Germany). Cf. *Loving v. Virginia*, 338 U.S. 1, 12 (1967) (the freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men" and "one of the 'basic civil rights of man', fundamental to our very existence and survival"); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural").

[39] See, e.g. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty"); *De Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947) (Hand, J.) ("nothing can be more disingenuous than to say that deportation in these circumstances is not punishment").

or more.[40] An applicant for admission at the border may not have a constitutional Due Process right to an attorney vis-à-vis the decision to turn her away. But she arguably does have a Due Process right to an attorney when the government goes further and attempts to penalize the person by imposing a bar preventing reentry for five years or more.

The precise contours of the constitutional right to an attorney during an immigration proceeding at the border have not been established. But it is certainly reasonable and appropriate to assert such a constitutional right, at least where there are important interests of U.S. citizens, permanent residents or U.S. businesses at stake, or where the government is attempting to penalize the applicant.

CONCLUSION

Congress has charged DHS with the protection of the U.S. as well as the facilitation of the legitimate flow of people and goods across the nation's borders. DHS implements this mission at ports of entry through CBP, the single unified border agency of the United States. Attorneys can be of enormous support in helping CBP achieve its goals.

Until DHS, Congress, or the courts abrogate the unjustified INS policy barring representation to persons appearing before CBP in primary and secondary inspection, an incongruity of major significance will continue to exist. Current border practices allow 40-foot freight containers to expert representation in respect to the maze of complex regulations that govern the entrance of freight to this nation. People, including asylees, businesspeople, permanent residents and family members of U.S. citizens are denied such assistance.

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[40] Depending on the circumstances, the applicant may be permanently barred from ever obtaining status in the United States. If DHS alleges that the person has made a false claim to U.S. citizenship, then the person may be permanently barred from reentering under §212(a)(6)(C)(ii). If DHS alleges that the person is attempting a reentry after having been previously removed from the United States, the person may be permanently barred under §212(a)(9)(C).