



Immigration Update

by H. Raymond Fasano

The Reach and Impact of Immigration Issues in Our Daily Practice

I am fortunate to have this opportunity to discuss

the reach and impact that immigration law has on almost every practice area of the law. The Federal Bar Association offers a unique platform from which to publish the influence of immigration law since government lawyers, private lawyers, and judges have an opportunity to further the mission of the FBA, which “is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the federal practitioner, both public and private, the federal judiciary, and the public they serve.”¹ An understanding of the influence of immigration law allows the FBA member to see how the FBA mission can be furthered.

The U.S. Supreme Court has long recognized that aliens² may be entitled to an “ascending scale of rights” as they increase their identity with the American society.³ The court reasoned that “[m]ere lawful presence in the country creates an implied assurance of safe conduct and gives [an alien] certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.”⁴ Although they are aliens, lawful permanent residents (LPRs) (green card holders) are on the path to full citizenship so long as they meet the regulatory requirements.⁵ As a result of being a significant segment of American society, aliens are entitled to a wide array of constitutional rights.⁶ It is these rights that an alien acquires in the United States that practitioners in different areas of the law assert on behalf of the alien.

It is impossible to distinguish LPRs from U.S. citizens in our daily lives as they comprise our neighbors, friends, colleagues, and family members. LPRs may remain in the United States indefinitely so long as they are in compliance with the immigration laws. Failure to comply with immigration laws may result in loss of LPR status and an order of removal from the United States.⁷ Despite the fact that LPRs are firmly established in the fabric of America, states have recently enacted laws that have attempted to limit or curtail the rights enjoyed by aliens that may not be LPRs. In cases where restrictive state laws have been struck down, the Supreme Court has emphasized “the rights thus protected were those of aliens who

were *lawfully* inhabitants of the states in question.”⁸

The Supreme Court has explained that

once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens.* They extend their inalienable privileges to all “persons” and guard against any encroachment on those rights by federal or state authority.⁹

Arizona’s state law that sought to have state officials enforce immigration laws was partially struck down by the Supreme Court. The Court held that (1) provision making failure to comply with federal alien-registration requirements a state misdemeanor was pre-empted; (2) provision making it a misdemeanor for unauthorized alien to seek or engage in work in Arizona was pre-empted; (3) provision authorizing arrests for removable offense was pre-empted; but (4) preliminary injunction against provision requiring officer conducting stop, detention, or arrest to verify person’s immigration status with federal government if officer had suspicion that the person was unlawfully in United States was improper.¹⁰

Although the broad range of constitutional rights extend to aliens who are lawfully present in the United States, aliens that are present in violation of U.S. immigration laws enjoy limited rights. For example, in the area of labor law, undocumented aliens may pursue actions based on the Fair Labor Standards Act. An individual’s undocumented status is not a basis to refute a claim for back pay.¹¹

In the area of criminal law, the Supreme Court held that the immigration consequences of a conviction on a noncitizen are often more severe than the criminal punishment.¹² *Padilla* held that a defendant’s Sixth Amendment right to effective assistance of counsel requires that she be advised of the immigration consequences of a conviction before the alien pleads guilty in order to assure that a plea is knowingly and

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voluntarily given. The defendant in *Padilla* had pled guilty based on the erroneous advice that his plea to a drug trafficking offense had no immigration consequences.¹³ Since he had abandoned his right to trial he was entitled to advice of competent counsel before he did so.

Noncitizens' rights are also asserted in the area of tax law. The U.S. Court of Appeals for the Second Circuit held that aliens who are not immigrants of the United States that are employees of designated international organizations are entitled to certain privileges, exemptions and immunities by virtue of their occupational status. For example, Congress has allowed them to establish domicile in the United States.¹⁴

Where does all of this leave us as members of the FBA? I would hope that this article has engendered thought in the reader about the ways in which immigration law impacts the area of law in which she practices. Would the reader's colleagues in her field benefit from more information regarding the impact of immigration issues in their area of practice? How valuable would a CLE be that addresses immigration issues in the practitioner's area of practice? It is the author's opinion that all members of the FBA would benefit from a comprehensive, multi-practice area CLE that would be co-sponsored by the Immigration Law Section and other sections and divisions so that FBA members would have the depth of understanding of immigration issues so that they can better serve their clients and further the mission of the FBA. ☉

Endnotes

¹FBA, *FBA Fact Sheet*, www.fedbar.org/For-the-Media/FBA-fact-sheet.aspx.

²8 U.S.C. § 1101(a)(3) defines an alien as "any person not a citizen or national of the United States."

³*Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

⁴*Id.*

⁵An LPR is eligible to apply for citizenship if she establishes that she (1) is at least 18 years old; (2) has been lawfully admitted as a permanent resident for at least 5 years (less for some individuals); (3) is a person of good moral character; and (4) has established a residence and maintained continuous physical presence in the United States for a certain period of time. See 8 C.F.R. § 316.2(a).

⁶See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270–71 (1990) (contrasting Fourth Amendment protections of nonresident aliens with aliens resident in the United States); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that a state stat-

ute denying welfare benefits to resident aliens violates the Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment."); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country."); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (concluding that "all persons within the territory of the United States [including aliens] are entitled to the protection guaranteed by [the Fifth and Sixth Amendments]"); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens.").

⁷See 8 C.F.R. § 1001.1(p) ("The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission."); See generally *Vartelas v. Holder*, — U.S. —, 132 S.Ct. 1479, 1483–85 (2012).

⁸*United States v. Portillo-Munoz*, 643 F.3d 437, 441 (5th Cir.2011) (emphasis added). See *In re Kwong Hai Chew*, 344 U.S. 590, 596 (1953) (holding that an alien is entitled to the Fifth Amendment protection to the extent he "is a lawful permanent resident of the United States and remains physically present there"); *Truax v. Raich*, 239 U.S. 33, 39 (1915) (holding that "the complainant is entitled under the 14th Amendment to the equal protection of its laws" because he is "lawfully an inhabitant of Arizona").

⁹*Kwong Hai Chew*, 344 U.S. at 596 n.5 (emphasis added) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (Murphy, J., concurring)).

¹⁰*Arizona v. United States*, 132 S. Ct. 2492 (2012).

¹¹See generally *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002) (holding that back pay awards to undocumented workers terminated in violation of the National Labor Relations Act ran counter to federal immigration law); cf. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 243 (2d Cir.2006) (noting that majority of courts to address the question have concluded that *Hoffman Plastic* does not preclude FLSA awards for back pay).

¹²*Padilla v. Kentucky*, 559 U.S. —, —, 130 S. Ct. 1473, 1486 (2010).

¹³*Id.*

¹⁴*Ying v. C.I.R.*, 25 F.3d 84, 86 (2d Cir. 1994).

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⁸599 F.3d at 1257.

⁹*Id.*

¹⁰See *id.*

¹¹See *id.* at 1259–63.

¹²See *id.* at 1262 (citing 11 U.S.C. § 549(a)).

¹³See, e.g., *In re C.W. Min. Co.*, No. 08–20105, 2012 WL 3839287, at *9–11, *13 (B.A.P. 10th Cir. Sept. 5, 2012) (denying post-petition transfer action when permitting trustee to avoid unauthorized post-petition transfer, which occurred when bank with security interest in certificate of deposit (CD) executed thereon and applied CD to reduce debtor's obligation on promissory notes, would revive bank's security interest in CD, and there would be no benefit to Chapter 7 estate); *Dill v. Brad Hall & Assocs., Inc. (In re Indian Capitol*

Distrib., Inc.), No. 09–11558, 2011 WL 4711895, at *11 (Bankr. D.N.M. Oct. 5, 2011) (dismissing trustee's action without prejudice because "injury in fact" is a core requirement of federal jurisdiction under Article III, § 2 of the United States Constitution and where the value of goods delivered by vendor was reasonably equal to the amount paid by the debtor, trustee had "not established (or even alleged) that the estate suffered an injury").

¹⁴See 11 U.S.C. § 366; see also § 2-609 (discussing the right to adequate assurance of performance).

¹⁵Seeking such permission is known as a motion for the debtor's use of cash collateral. For guidance on how to make such a motion, see 11 U.S.C. 363(c), Fed. R. Bankr. P. 4001(b) and any applicable local bankruptcy rules of the jurisdiction.