CAN SOME RETURNING NONIMMIGRANTS CHALLENGE AN EXPEDITED REMOVAL ORDER IN COURT? HOW RECENT CASE LAW MAY PROVIDE A WINDOW OF OPPORTUNITY

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Under section 235(b)(1) of the Immigration and Nationality Act ("INA"), U.S. immigration officers may order certain non-citizens who are arriving in the United States to be removed on an expedited basis, without any appeal or meaningful judicial review. This "expedited removal" process can lead to unfair results, but the conventional wisdom has been that it is impossible to challenge such results effectively because of the broad bars on review. Recent cases in other areas of the law, however, suggest that it may be possible to challenge some expedited removal orders and the related bar on judicial review as unconstitutional, especially in the case of certain nonimmigrants who return from a relatively brief trip abroad after having spent substantial time in the United States.

The expedited removal process, which was created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), applies to "arriving aliens" seeking admission at a U.S. port of entry who are said by U.S. Customs and Border Protection ("CBP") to be inadmissible under INA § 212(a)(6)(C), regarding fraud and false claims to U.S. citizenship, or INA § 212(a)(7), regarding lack of proper documentation. (It also can be applied to certain groups of people who have entered the U.S. unlawfully and been here relatively briefly, but that is beyond the scope of this article.) The statute explains that in such a case, "the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under or a fear of persecution." Even an asylum claimant will only escape expedited removal (and instead be placed in ordinary removal

proceedings under INA § 240) if an asylum officer or immigration judge finds him or her to have a "credible fear" of persecution or torture.

Although expedited removal is restricted by statute to cases of fraud or lack of documentation, those with facially valid nonimmigrant visas are sometimes subjected to this process if CBP does not believe that they intend to comply with the conditions of their nonimmigrant admission, but instead believes them to be intending immigrants. As the Court of Appeals for the Seventh Circuit explained in *Khan v. Holder*,

The troubling reality of the expedited removal procedure is that a CBP officer can create the § 1182(a)(7) charge by deciding to convert the person's status from a non-immigrant with valid papers to an intending immigrant without the proper papers, and then that same officer, free from the risk of judicial oversight, can confirm his or her suspicions of the person's intentions and find the person guilty of that charge.

In a January 2010 web article and two related postings on the Insightful Immigration Blog in January and February 2010, for example, Cyrus D. Mehta described expedited removal orders issued against a number of H-1B nonimmigrants by CBP at Newark airport, based not on any allegation that the nonimmigrants lacked genuine visa stamps but on CBP's objections to the nature of their employment (which CBP believed was not in compliance with H-1B status). One who is removed under these expedited procedures can then be subjected to a five-year bar on re-entry to the United States, although CBP can sometimes be convinced as a matter of its discretion to rescind the order after the fact and convert it retroactively to a voluntary decision to withdraw the application for admission, which carries no such bar on re-entry.

According to INA § 242(e), judicial review of an INA § 235 expedited removal order "is available in habeas corpus proceedings, but shall be limited to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under , and (C) whether the petitioner can prove . . . is an alien lawfully admitted for permanent residence" or has been granted refugee status under INA § 207 or asylum under INA § 208. This statutory habeas review includes "no review of whether the alien is actually inadmissible or entitled to any relief from removal." There is also a provision for challenges to the validity of the system, or written policies and procedures issued under it, to be brought in the U.S. District Court for the District of

Columbia within 60 days of the challenged policy or procedure first being implemented. Outside of these limited means of review, INA § 242(a)(2)(A) purports to bar any other federal court jurisdiction over INA § 235 expedited-removal orders.

A number of Courts of Appeals, including the Seventh Circuit in *Khan*, have honored these jurisdictional limitations and refused to review the substantive inadmissibility determinations made by CBP in its expedited removal orders. Some recent cases in other contexts may, however, suggest a potential method to overcome these jurisdictional limitations and demonstrate why the expedited removal procedure is unconstitutional, especially with respect to certain nonimmigrants who are returning to the United States from a relatively brief trip abroad after having spent time here.

The first piece of the puzzle is the Supreme Court's 2008 decision in *Boumediene v. Bush*. That case stemmed from the Bush Administration's attempt to detain at Guantanamo Bay certain noncitizens said to be "enemy combatants". Although Congress had attempted in the Military Commissions Act ("MCA") to preclude the Guantanamo detainees from challenging their detention by a petition for a writ of habeas corpus, the Court held that this was "an unconstitutional suspension of the writ." "If the privilege of habeas corpus is to be denied to the detainees now before us," the Court said, "Congress must act in accordance with the requirements of the Suspension Clause."   That clause of the U.S. Constitution allows suspension of the writ of habeas corpus only "when in Cases of Rebellion or Invasion the public Safety may require it." Because Congress had not even purported to exercise its Suspension Clause power in enacting the MCA, and the alternate review procedures it had provided were not a constitutionally adequate substitute for habeas review, the Guantanamo detainees were entitled to seek the constitutionally protected writ of habeas corpus.

Under *Boumediene*, it appears that an alien detained during the expedited removal process has a right to the writ of habeas corpus as preserved by the Constitution, since Congress did not exercise its Suspension Clause power in enacting INA § 242. The question then becomes whether the statutory habeas review provided by INA § 242(e) is sufficient to fulfill this constitutional right, or whether the restrictions of INA § 242(e), in combination with the bar on other review of INA § 242(a)(2)(A), violate *Boumediene*.

The Supreme Court held in *Boumediene* that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." This is in substantial tension with the provision of INA § 242(e) that habeas review of an expedited removal order should involve "no review of whether the alien is actually inadmissible or entitled to any relief from removal." And since the *Boumediene* Court actually drew this portion of its holding from an immigration case, *INS v. St. Cyr* (which had provided for such legal review as a statutory matter and avoided the constitutional issue on the ground that Congress had in the relevant context not clearly barred habeas review), the holding certainly appears applicable in the immigration context.

The *Boumediene* Court also held that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings" and that "here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing." Admittedly, "he intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry." But the brief and summary nature of the administrative expedited removal process, with a lack of legal representation for the person being removed or any real opportunity for that person to present evidence, calls to mind the *Boumediene* Court's observation that "where the underlying detention proceedings lack the necessary adversarial character, the detainee cannot be held responsible for all deficiencies in the record." Thus, it appears that a habeas court should be entitled under *Boumediene* to consider new evidence, as well, on review of an expedited removal order.

The next logical question is whether there is something about the rights of arriving aliens which might make it less constitutionally unreasonable for Congress to have barred them from meaningful administrative or judicial review. There is a long line of authority – although it may arguably have been undercut by *Boumediene* – to the effect that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." However, as the Supreme Court recognized in the 1982 case of *Landon v. Plasencia*, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." Such an alien has a right to due process of law

under the Fifth Amendment to the U.S. Constitution. A January 2011 decision of the Court of Appeals for the Second Circuit, *Galluzzo v. Holder*, recognizes that due process rights under *Plasencia* extend beyond those who are admitted as Lawful Permanent Residents ("LPRs")—that is, who have "green cards".

The petitioner in *Galluzzo* sought review of an Order of Removal that had been issued against him under INA § 217 without a hearing, based on his admission to the United States under the Visa Waiver Program ("VWP") and the government's allegation that he had waived his rights to a hearing under that program. Based primarily on *Plasencia* and its above-quoted language regarding the rights of an alien who begins to develop the ties that go with permanent residence, the Court of Appeals held that "in the absence of a waiver, Galluzzo has a constitutional right to a pre-removal hearing." This was so despite the fact that the permanence of Galluzzo's residence had not been authorized by the government: he "concede that he entered the United States on a ninety-day tourist visa issued through the VWP," and he had "stayed well beyond the permitted ninety days." We therefore know from *Galluzzo* that the due process right to a hearing under *Plasencia* extends beyond an LPR such as Ms. Plasencia.

To see the relevance of this principle to certain arriving aliens and their expedited-removal cases, we must return to *Plasencia* itself. Ms. Plasencia had left the United States for "a few days" and was in that sense a "returning resident alien" seeking to be let back into the United States, rather than one continuously present in the United States whom the government sought to deport. She was placed in exclusion proceedings, the pre-1997 equivalent of removal proceedings for arriving aliens. The Supreme Court held that it was proper under the statute for the then-INS to have placed Ms. Placencia in exclusion proceedings rather than deportation proceedings in which she would receive more statutory rights, but that it was possible her constitutional right to due process of law as a returning resident alien had been violated by some aspects of the exclusion proceedings.

"If the exclusion hearing is to ensure fairness," the Court held, "it must provide Plasencia an opportunity to present her case effectively, though at the same time it cannot impose an undue burden on the government." Acknowledging Ms. Plasencia's concern about the potentially inadequate advance notice provided her of the charges against her, and other aspects of the exclusion proceedings, the Court held that "the other factors relevant to due process

analysis-the risk of erroneous deprivation, the efficacy of additional procedural safeguards, and the government's interest in providing no further procedures-have not been adequately presented to permit us to assess the sufficiency of the hearing." The Court therefore remanded for further exploration of those issues.

Like Ms. Plasencia's due process right, the constitutional right of a resident nonimmigrant to due process of law before removal should not be affected by a relatively brief departure abroad. While the *Plasencia* Court spoke of a "returning resident alien," it did not indicate that such a resident alien necessarily need be a Lawful Permanent Resident (LPR) in the statutory sense, as opposed to a resident of the United States having some other status. There are some references to a "permanent resident alien" in the *Plasencia* decision as well, but as the Second Circuit implicitly recognized in *Galluzzo* when it relied on *Plasencia* to establish the rights of a VWP overstay, a alien who has "beg to develop the ties that go with permanent residence" need not be an alien who has been specifically declared an LPR by statute or regulation. Indeed, given that the case law standing for the proposition that a resident alien is entitled to due process, as cited by the *Plasencia* Court, predates the enactment of the Immigration and Nationality Act in 1952 and its creation of the statutory rules governing lawful permanent residence as that term is currently used, the constitutional rule explicated in *Plasencia* logically cannot be dependent on the current statutory status of an LPR. Moreover, if one who has unlawfully overstayed a brief nonimmigrant admission has due process rights under *Plasencia*, as the Second Circuit held in *Galluzzo*, then a returning nonimmigrant whose lengthy presence in the United States has been fully authorized by law should have at least as much right to due process, whether or not that lengthy presence was authorized to be "permanent" in a formal sense.

If returning resident nonimmigrants who have been absent for a relatively brief period of time can claim due process rights under *Plasencia*, as it appears from *Galluzzo* they should be able to, then expedited removal procedures as they currently exist are likely to be deemed a more clearly deficient process than the exclusion proceeding at issue in *Plasencia*. As suggested by the Court of Appeals for the Seventh Circuit in *Khan*, the expedited removal process "is fraught with risk of arbitrary, mistaken, or discriminatory behavior" because there is effectively no review of the decision by CBP officials who serve, one might say, as judge, jury and executioner. "When the Constitution requires a

hearing," the Supreme Court has said, "it requires a fair one, one before a tribunal which meets at least prevailing standards of impartiality."   Additional procedural safeguards could be easily provided by allowing representation by counsel at an expeditious hearing before a neutral adjudicator such as an immigration judge—as was often available in exclusion proceedings before IIRIRA created the expedited removal process.

Of course, it would likely be futile to seek admission to the United States and claim due process rights on the theory that one was returning to a prior unlawful residence in the U.S., along the lines of the residence conceded by the overstayed petitioner in *Galluzzo*. Anyone who lacked an immigrant visa, as those subjected to expedited removal generally do, and who sought to return to a prior unlawful residence as, say, a tourist in B-2 nonimmigrant status (in violation of the statutory requirement that such a nonimmigrant "hav a residence in a foreign country which he has no intention of abandoning"), would likely establish by his own assertions the propriety of his removal under INA § 212(a)(7) as an intending immigrant lacking proper documentation. Thus, there would be no prejudice flowing from the challenged process and no cognizable constitutional claim. But not all nonimmigrants are forbidden by law as a condition of their status to abandon their foreign residence and take up residence in the United States, and so it is possible for some nonimmigrants to be returning residents under *Plasencia* who seek to return to a residence in the United States that it is perfectly lawful for them to have.

Although many well-known nonimmigrant categories such as that of B-2 tourist, B-1 business visitor, or F-1 student require that the nonimmigrant have a residence abroad that he or she lacks the intention of abandoning, several nonimmigrant categories do not. H-1B workers in a specialty occupation, L-1A international transferee managers and executives, and L-1B international transferee workers with specialized knowledge, for example, may have what is known as "dual intent": they are exempt from the presumption of immigrant status under INA § 214(b), and are authorized by regulation to renew their nonimmigrant status while simultaneously pursuing permanent residence. Moreover, although there are ordinarily time limits on total stays in H-1B and L status (6 years in H-1B status, 5 years in L-1B status, or 7 years in L�1A status, with time in any of the three statuses counted against the total), the American Competitiveness in the 21st Century Act ("AC21") allows for extensions of time in H-1B status beyond the 6-year limit. As long as it has been more than year

since the filing of an application for labor certification, or an I-140 petition, that has not been finally denied, an H-1B nonimmigrant can have her status (and ability to obtain a visa) extended for one year at a time under section 106(a) of AC21; once an I-140 petition is approved but LPR status cannot be sought due to a lack of an available immigrant visa number, the status of the H-1B nonimmigrant (and her ability to obtain an H-1B visa) can be extended for three years at a time under section 104(c) of AC21. In some categories, the wait for an immigrant visa number can last many years: in the subquota for natives of India within the Employment-Based Third Preference for workers filling a job requiring a bachelor's degree, for example, only an application for labor certification filed before March 15, 2002 will make available an immigrant visa number as of March 2011. In fact, because these cutoff dates are not guaranteed to move forward in anything approaching real time, some individuals within the State Department's Visa Office suggested in 2009 that the wait for some categories could actually be measured in "decades" and perhaps total 40 years. Even assuming constant forward movement of cutoff dates in real time, however, someone for whom a labor certification was first filed after approximately five years of H-1B time could, pursuant to AC21, end up maintaining H-1B status for a total of roughly fourteen years.

E-1 treaty traders, E-2 treaty investors, and O-1 aliens of extraordinary ability, meanwhile, also are not required to maintain a foreign residence which they lack the intention to abandon, although their statuses do not allow pure dual intent and they remain subject to INA § 214(b). By regulation, "he approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an O–1 petition, a request to extend such a petition, or the alien's application for admission, change of status, or extension of stay." Similarly, the regulation governing E-1 and E-2 status, although it states that "n alien classified under section 101(a)(15)(E) of the Act shall maintain an intention to depart the United States upon the expiration or termination of E–1 or E–2 status", nonetheless provides that "an application for initial admission, change of status, or extension of stay in E classification may not be denied solely on the basis of an approved request for permanent labor certification or a filed or approved immigrant visa preference petition." That is, an E-1, E-2, or O-1 nonimmigrant may proceed towards LPR status so long as he or she intends to depart if refused a further extension of nonimmigrant status, even if the nonimmigrant's intent is to depart in order to re-enter as soon as

possible with an immigrant visa and take up LPR status. Moreover, there is no statutory or regulatory limit on the number of extensions of stay available to an E-1, E-2, or O-1 nonimmigrant, so such a nonimmigrant can lawfully remain resident in the United States for decades at a time.

Thus, nonimmigrants in categories such as E-1, E-2, H-1B, L-1 and O-1, who are returning to the United States after lawfully residing here in nonimmigrant status for many years, can plausibly claim that they are returning residents with constitutional rights under *Plasencia*, and simultaneously maintain the validity of the nonimmigrant status which they seek admission to resume. If subjected to expedited removal based, for example, on an erroneous allegation by CBP that their past and intended future activities in the United States are inconsistent with their status, such returning nonimmigrants should be able to petition for a writ of habeas corpus under *Boumediene* and thereby challenge the expedited removal procedure as a deprivation of their liberty without due process of law according to *Plasencia* and *Galluzzo*. The error-prone and arbitrary expedited removal process, while it may be constitutional as applied to initial entrants with no prior ties to the United States, is not a constitutionally adequate manner in which to deny a previously admitted lawful nonimmigrant resident of the United States the right to return to what may have been their home for many years.

The ideal time to file a habeas petition under the theory outlined in this article would be while the petitioner was detained by CBP pending execution of the expedited removal order. Whether such a challenge might be possible following execution of an expedited removal order is a subject for further analysis, but it would at least be substantially more difficult. Classically, a constitutionally protected habeas petition would as a general matter require the petitioner to be in custody at the time the petition was filed, and a petitioner who has already been removed is not in custody, at least in the simplest and most straightforward sense of that term.

CBP often allows those subject to expedited removal proceedings to contact a friend while they are detained, but discourages or prevents them from contacting attorneys, presumably on the basis that an applicant for admission lacks the right to legal representation during initial inspection. (The chain of logic between the lack of right to representation and a prohibition on speaking to an attorney strikes this author as a bit strained, but that is an issue for another day.) Therefore, it may be wise for any nonimmigrant who anticipates

potential difficulties upon arrival to ensure that the friend or friends whom they would likely attempt to call if detained is in possession of the contact information for an appropriate immigration attorney. If concerned that CBP might not allow any communication, or that a single attempt to call while detained by CBP might not reach anyone, a more cautious alternative would be to make a plan to check in with such a friend by phone immediately after one's flight lands, before proceeding into the immigration inspection area and the perhaps broader area in which cellphone use is prohibited, and advise that an appropriate immigration attorney should be contacted if the arriving nonimmigrant is not heard from again within a preset amount of time.

8 U.S.C. § 1225(b)(1).

More precisely, only one who is not a U.S. national can be removed from the U.S., but there are few U.S. nationals who are not U.S. citizens—primarily people from American Samoa. *See* INA §§ 101(a)(29), 308. References to non-citizens in this article should be read to exclude noncitizen nationals.

In this article, references to expedited removal refer solely to the process created by INA § 235(b)(1). There is a different process created by INA § 238(b) for expedited removal of aliens who have been convicted of an aggravated felony, *see* INA § 237(a)(2)(A)(iii), and either have not been lawfully admitted for permanent residence or have been admitted only on a conditional basis.

Pub.L. 104-208, Div. C, 110 Stat. 3009-546. Prior to IIRIRA, the closest thing to modern expedited removal proceedings were summary exclusion proceedings under INA § 235(c) for certain aliens suspected of intent to engage in subversive activities, *see*, *e.g.*, *Rafeedie v. INS*, 880 F.2d 506, 507-508 (D.C. Cir. 1989), but even those proceedings involved layers of administrative review, although no true hearing.

For a definition of the term "arriving alien", see 8 C.F.R. § 1.1(q). For purposes of expedited removal, certain persons otherwise deemed arriving aliens who used an advance parole to enter are not considered as such: the regulation states that "an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section 235(b)(1)(A)(i) of the Act."

8 C.F.R. § 235.3(b)(1)(i); *see* 8 U.S.C. § 1182(6)(C), (7). The regulation exempts from expedited removal "citizens of Cuba arriving at a United States port-of-entry by aircraft." 8 C.F.R. § 235.3(b)(1)(i).

By statute, this authority can also be used, if the Attorney General chooses to issue regulations so providing, against any alien "who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility," except for "an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations" – that is, Cuba – "and who arrives by aircraft at a port of entry." INA § 235(b)(1)(A)(iii)(II), (b)(1)(F). Existing regulations empower the "Commissioner" (of the former INS), and now the Secretary of Homeland Security, to exercise the Attorney General's discretionary authority to designate subclasses of aliens within this broader statutory class who are subject to expedited removal. *See* 8 C.F.R. § 235.3(b)(1)(ii). One such designation, issued in 2002 at 67 Fed. Reg. 68924 and online at http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-79324/0-0-0-79342/0-0-0-80383.html, designates as subject to expedited removal "aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by a Service officer." Another designation, issued in August 2004 at 69 Fed. Reg. 48877 and online at http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-94157/0-0-0-94177/0-0-0-94493.html, designates as subject to expedited removal "Aliens determined to be inadmissible under sections 212(a)(6)(C) or (7) of the Immigration and Nationality Act who are present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter." DHS indicated in the latter designation that it "plans under this designation as a matter of prosecutorial

discretion to apply expedited removal only to (1) third-country nationals and (2) to Mexican and Canadian nationals with histories of criminal or immigration violations, such as smugglers or aliens who have made numerous illegal entries."

INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 208.30.

Khan v. Holder, 608 F.3d 325, 329 (7th Cir. 2010).

http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus2010116101152

http://cyrusmehta.blogspot.com/2010/01/expedited-removal-of-h-1b-workers-at.html (January 12, 2010) and http://cyrusmehta.blogspot.com/2010/02/more-on-h-1b-admissions-at-newark.html (February 2, 2010).

As explained in the above-referenced January 12 blog post, "Some H-1Bs have been removed because they were working at client work sites, and the position of the Customs and Border Protection officer was that the H-1B petition should have been filed by the client and not by the IT consulting company."

INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i). This bar does not apply if DHS (formerly the Attorney General) consents to the alien's application for readmission, *see* INA § 212(a)(9)(A)(iii). Such consent is generally sought on Form I-212, although it appears from the statute that in the case of a nonimmigrant, a waiver of inadmissibility under INA § 212(d)(3) should also be a possible means to resolve this issue.

One instance of this being done was discussed in Cyrus Mehta's January 9, 2011 blog posting at http://cyrusmehta.blogspot.com/2011/01/one-year-after-neufeld-memo-can-beast.html.

INA § 242(e)(2), 8 U.S.C. § 1182(e)(2).

INA § 242(e)(5), 8 U.S.C. § 1182(e)(5).

INA § 242(e)(3), 8 U.S.C. § 1182(e)(3). The American Immigration Lawyers Association brought such a challenge when the system was first implemented, but the case was dismissed and the dismissal affirmed by the Court of Appeals for the D.C. Circuit. *American Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352

(C.A.D.C. 2000); *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998).

INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A), provides in part that "Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title," and goes on to restate the bar on review to various other aspects of § 235(b)(1).

Khan, 608 F.3d at 329-330; *Brumme v. INS,* 275 F.3d 443 (5th Cir. 2001); *Li v. Eddy,* 259 F.3d 1132, 1134 (9th Cir. 2001), *opinion vacated as moot,* 324 F.3d 1109 (9th Cir. 2003). In *Brumme*, the petitioner had not preserved any constitutional claim.

553 U.S. 723 (2008).

Boumediene, 553 U.S. at 792.

Id. at 771.

U.S. Const., Art. I, § 9, cl. 2.

Boumediene, 553 U.S. at 771-792.

Id. at 779.

INA § 242(e)(5), 8 U.S.C. § 1182(e)(5).

553 U.S. 289 (2001).

INS v. St. Cyr, 553 U.S. at 308-314.

Boumediene, 553 U.S. at 781, 783.

Id. at 783.

Id. at 791.

Landon v. Plasencia, 459 U.S. 21, 32 (1982) (citing, *e.g.*, United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 659-660, 12 S.Ct. 336, 338, 35 L.Ed. 1146 (1892)).

459 U.S. 21, 32 (1982).

See id. at 32.

Galluzzo v. Holder, ___ F.3d ___, Docket Nos. 08-6036-ag; 09-2255-cv, 2011 WL 222343 (2d Cir. Jan. 26, 2011).

Because Michael Landon, an INS District Director, was a government official, it appears better practice to cite this case in short by reference to Ms. Plasencia, as per Rule 10.9(a)(i) of the *Bluebook*.

Galluzzo, 2011 WL 222343 at *1-*2.

2011 WL 222343 at *2. The Court of Appeals additionally provided a "*see also*" citation to *Plyler v. Doe,* 457 U.S. 202, 210 (1982).

Id. at *1.

Plasencia, 459 U.S. at 33-34.

Id. at 23-25.

The Immigration and Naturalization Service was replaced by components of the Department of Homeland Security (what are now CBP, ICE, that is, Immigration and Customs Enforcement, and USCIS, that is, U.S. Citizenship and Immigration Services) in 2003.

Plasencia, 459 U.S. at 37.

Id..

On remand, the Court of Appeals for the Ninth Circuit remanded back to the district court. *Plasencia v. District Director, INS*, 719 F.2d 1425 (9th Cir. 1983). The final disposition of the case is not apparent in the Westlaw database of cases.

Id. at 33.

Id.

Plasencia, 459 U.S. at 32, *quoted in Galluzzo*, 2011 WL 222343 at *2.

See, *e.g.*, INA § 101(a)(20) (defining "lawfully admitted for permanent residence"); [*United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927)]; *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133, 134 (1924); *Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912); *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903).

Khan, 608 F.3d at 329.

Wong Yang Sun v. McGrath, 339 U.S. 33, 50 (1950).

INA § 101(a)(15)(B).

See Galluzzo, 2011 WL 222343 at *3. The presence or absence of prejudice in *Galluzzo* was complicated by the potential availability of relief, such as an application for adjustment of status to permanent resident under INA § 245, that cannot be obtained in most instances by an arriving alien who has not been admitted or paroled into the United States.

See INA § 101(a)(15)(B), (F); 8 C.F.R. § 214.2(b), (f).

See INA § 101(a)(15)(E), (H), (L), (O); 8 C.F.R. § 214.2(e), (h), (l), (o).

See 8 C.F.R. §§ 204.2(h)(16), 245.2(a)(4)(C); *see also* INA § 214(h) (stating, somewhat superfluously, that seeking permanent residence in the United States "shall not constitute evidence of an intention to abandon a foreign residence for purposes of obtaining a visa as a nonimmigrant described in subparagraph (H)(i)(b) or (c), (L), or (V) of section 101(a)(15) or otherwise obtaining or maintaining the status of a nonimmigrant described in such subparagraph, if the alien had obtained a change of status under section 248 to a classification as such a nonimmigrant before the alien's most recent departure from the United States.")

INA § 214(g)(4), 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(13)(iii).

8 C.F.R. § 214.2(*l*)(12).

Id.

8 C.F.R. § 214.2(h)(13)(iii); 8 C.F.R. § 214.2(*l*)(12). One who has exceeded the limits may remain outside the United States for one year and in so doing reset the limitations clock to zero.

Pub. L. 106-313, as amended by Pub. L. 107-273 (21st Century DOJ Appropriations Authorization Act) and Pub. L. 109-13 (REAL ID Act of 2005).

Additional information regarding AC21 is available in a November 2010 article by Cyrus D. Mehta and Gary Endelman at http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus2010111523221 and in June 2008 and May 2005 articles by Cyrus D. Mehta at

http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus2008615115438 , http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus20086772537, and http://cyrusmehta.com/perseus/News.aspx?MainIdx=ocyrus200591724845&Month=&Source=Zoom&Page=1&Year=All&From=Menu&SubIdx=1152

See http://travel.state.gov/visa/bulletin/bulletin_5337.html.

See http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus2009615234712 .

See INA § 101(a)(15)(E), (O); 8 C.F.R. § 214.2(e), (o).

8 C.F.R. § 214.2(o)(13).

8 C.F.R. § 214.2(e)(5).

See supra note 14 and accompanying text.