Richard S. Riess
A 088-664-582
1705 E. Hanna Rd
Eloy, AZ 85131

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

In the matter of: Richard Steven Riess, Respondent, File No.: 088-664-582 In Removal Proceedings	Brief in Support of Appeal From an Order of Removal

I. Introduction / Factual Background

The Respondent, Richard Riess, a 35 year old male, was arrested on unrelated charges by the Phoenix Police Department in Phoenix, Arizona on 7-24-07. While being booked into the Maricopa County Jail a Maricopa County Sheriff's Office (MCSO) Deputy, acting under the authority of INA §287(g) placed an immigration detainer on the Respondent. The Officer had no evidence of alienage and no reason to believe the Respondent was an alien.

Prior to that point the Respondent had been convicted of a misdemeanor DUI, but otherwise, had never had any legal issues and had never been incarcerated. He has enjoyed a successful career as a Senior Software Engineer since 1996 and has always been financially stable and independent (at least, up to the point of being detained in July 2007). He has been a responsible single parent, with sole custody of his only child from the age of 15 months, in December 2001, right up to the day of his

arrest and detention on 7-24-07.

Although the Respondent was granted a bond of $900 he was held by the MCSO for two months because they refused to permit him to post bond, claiming he had an "ICE hold" and was, therefore, "barred from bonding out".

On 9-23-07 the Respondent was permitted to post bond and on 9-25-07 he was released from the Maricopa County Jail. At the last stage, before his release, he was arrested by an ICE Immigration Enforcement Agent (IEA). The Respondent immediately informed the IEA that he was a US citizen, and that he was born in California. The arresting IEA had no evidence of alienage and no reason to believe the Respondent was an alien. He was acting solely on the fact that an immigration detainer had been issued against the Respondent.

At approximately 8:30 am the Respondent was transported, against his will and against his protests, to the ICE/DHS facility located at 2035 N. Central Ave, in Phoenix, Arizona. There he was further detained and periodically interrogated as to his citizenship or alienage. The Respondent consistently asserted that he was a native US citizen and that he knew ICE did not have authority or jurisdiction to detain him. Regardless, the interrogating agent, Jason Martin, and other agents continued to try to coerce the Respondent to admit to being an alien. After more than ten hours the agents still had no evidence of alienage or reason to believe the Respondent was an alien. The Respondent was confined to holding tanks and the secure interrogation areas at all times. At no time was he provided an opportunity to leave or to discontinue the interrogation.

At approximately 8:00 pm the Respondent was loaded, against his will, into a secure DHS van and transported to the DHS Florence Service Processing Center (SPC) in Florence, Arizona, which is more than 50 miles from the location he was first arrested by ICE. He was held, over night, in a holding tank then transported the following morning to the Eloy Detention Center (EDC) in Eloy, Arizona. The EDC is more than 70 miles from the location of the initial arrest.

Upon arrival at EDC the Respondent was booked in and processed as an alien who had overstayed a visa. The following morning he was further interrogated by Deportation Officer Robert Cordero. By this point the DHS/ICE still had no evidence of alienage or reason to believe the Respondent was an alien. The Respondent continued to assert his US citizenship, through birth in California. Cordero essentially told the Respondent "If you're a US citizen prove it, but until then we have the authority to detain you here." The Respondent knew this was not true and refused to say anything further.

From that point the Department took no action to verify the Respondent's citizenship or alienage.

II. Procedural History

At the Respondent's Master Hearing on 10-31-07 the Respondent, again, asserted his citizenship (ER page 9, line 21 - page 10, line 12). The Department still had no evidence of alienage and, as such, could offer no evidence to refute the Respondent's claim. The Immigration Judge continued the hearing to 12-6-07 for the Respondent to obtain proof of citizenship (ER page 11, lines 8-9), even though the Department had not met it's burden of establishing alienage.

On 12-6-07 the Immigration Judge asked the Respondent if he had obtained proof of citizenship yet. The Respondent stated "No" (ER page 14, line 24 - page 15, line 1). To this point the Department had not submitted a single item of evidence to suggest the Respondent was an alien. In fact, at this point, the Department had not submitted a single item of evidence at all. Nonetheless, the Immigration Judge stated "...and based on the evidence I have before me, I would not be able to find that you're a United States citizen" (ER page 16, lines 11-12). The Immigration Judge acknowledged that the Department had presented no evidence in support of their allegations of alienage or unlawful presence (ER page 17, lines 20-23). The hearing was then continued to 2-6-08 to provide time for the Department to establish the Respondent's alienage (ER page 17, lines 23-24).

On 12-20-07, the day before the Respondent's bond hearing, the Department released the Respondent from DHS custody and on 12-21-07 submitted a motion to administratively close removal proceedings (Ex. 2). Upon his release the Respondent was taken into custody by the Eloy Police Department, due to a warrant in Maricopa County (which resulted from missing a court date due to being in ICE custody), transferred to the Pinal County Jail, then to the Maricopa County Jail, only to be transferred back to ICE custody due to an immigration detainer issued by Cordero upon the Respondent's release from EDC. On 12-28-07 the Respondent was transferred back to EDC.

On 1-9-08 the Department submitted a motion to withdraw their previous motion to administratively close (Ex. 3). The Respondent then submitted a motion to terminate removal proceedings (Ex. 4) citing the Department's failure to meet it's burden of establishing alienage.

On 2-6-08 the Immigration Judge and counsel for the DHS admitted the burden is on the government (the Department) to establish alienage, first. And until they do the burden is not on the Respondent to prove his citizenship (ER page 21, lines 21-22). This admission is clearly contrary to the Immigration Judge's prior statements regarding requiring the Respondent to provide proof of his citizenship (see ER page 10, line 13; page 11, lines 8-9, 11-12, page 11, line 24 - page 12, line 6; page 12, lines 13-14, lines 24-25; page 15, lines 21-24; page 16, lines 11-15). The Immigration Judge then granted the Department's motion to continue, for the purpose of providing the Department an opportunity to establish the Respondent's alienage (ER page 22, lines 3-9). The Respondent objected to the granting of this continuance (ER page 21, lines 7-12). Finally, as the Department had failed to produce any evidence of alienage, and therefore, failed to meet their burden of establishing alienage the Respondent informed the Court that he was not attempting to obtain his birth certificate (ER page 26, line 9).

On 4-28-08 the Department submitted, as a proposed exhibit, a document they allege to be a Canadian passport, bearing the name "Richard Riess" (Ex. 9).

On 5-5-08, in open court, the Respondent objected to the Department's submission of the purported passport (ER page 29, lines 9-19). Counsel for the Department then stated, falsely, that the passport was obtained from the Respondent when he was arrested (ER page 30, lines 4-7). The Respondent then corrected this misstatement (ER page 40, lines 18-22; page 41, lines 5-6). This is also supported by the Phoenix Police reports relating to the seizure of the passport (Ex. 47). At that time the Department failed to provide any evidence to support the authenticity of the purported passport. The Immigration Judge then refused to accept the passport

alone as sufficient proof of alienage and required the Department to establish alienage through fingerprints (which should have been an easy task as the Department alleges the Respondent was arrested in Canada in 1992) (ER page 31, lines 19-22).

On 6-6-08, upon failing to obtain a fingerprint match from Canada, the Respondent's Deportation Officers, Keith Acosta and Robert Cordero, filed a criminal complaint against the Respondent, in the District Court, charging him with one count of Perjury (18 USC §1621) and one count of False Personation, US Citizen (18 USC §911). The Respondent was then released from the custody of the DHS and transferred to the custody of the United States Marshal's Service (USMS) in order to answer to this new criminal complaint. On 6-10-08 the DHS submitted a motion to administratively close removal proceedings (Ex. 24) and on 6-11-08 the Immigration Judge granted that motion (Ex. 25). The Respondent was then held without bond while he fought the completely bogus charges brought against him by his Deportation Officers.

On 4-17-09, after being released from the custody of the USMS the Respondent was transferred back to the custody of the DHS. On 4-21-09 he was transferred back to the EDC.

On 6-22-09 the Respondent requested a continuance, in open Court, citing, in part, that he currently has one matter before the Appellate Court for the Ninth Circuit and one before the US District Court, wherein the facts of his citizenship are relevant and for those reasons he cannot make any statements relating to his citizenship (ER page 43, lines 5-11). The Immigration Judge refused to accept this as a reason to continue (ER page 43, lines 18-20). She did, however, grant a continuance based on the Respondent's claim that he is awaiting the arrival of

documents requested from various government agencies.

At that same hearing the Department submitted a Form I-261, "Additional Charges of Inadmissability/Deportability", withdrawing the original charge of INA §237(a)(1)(B) and adding INA §212(a)(6)(A)(i).

On 7-16-09 the Respondent submitted a "Motion to Terminate Removal Proceedings" (Ex. 32) which is based, in part, on the fact that it is the Department's documented policy that Canadian nationals are exempt from I-94, or other entry document requirements (per INS Service Inspector's Field Manual, Section 15.1(b)), it is the State Department's documented and published policy that Canadians present without a visa or an I-94 are to be treated as duration of status cases and shall not accrue unlawful presence status until after an Immigration Judge makes a finding of violation of status(per State Department Cable, no file number (Nov. 7, 1998), reprinted in 4 Bender's Immigr. Bull. 1103 (Nov. 15, 1999), 76 Interpreter Releases 1552 (Oct. 25, 1999)), BIA Matter of - (per 28 Immig. Rptr. B2-91 AAO Designation : N/A : Matter of - :: Dec. 16, 2003), and that the Department alleges that the Respondent is a Canadian citizen and national, who lacks an I-94, or other entry document.

On 7-23-09 the Immigration Judge interrogated the Respondent regarding the allegation of unlawful entry (ER pages 60-63). The Immigration Judge repeatedly asked the Respondent about documentation to establish that he entered the US legally. The Respondent clearly stated such documentation does not exist because, being a citizen who has bever left the US, he has, likewise, never "entered" the US. The Immigration Judge also asked numerous questions which the Respondent had

answered at prior hearings, however, was unable to answer currently, due to the outstanding matters before the Appellate Court for the Ninth Circuit and the US District Court.

At that same hearing the Immigration Judge acknowledged and admitted the Respondent's Motion to Terminate (ER page 55, lines 21-22) and the Department acknowledged the motion (ER page 56, lines 24-25), however, they did not present a clear or even apparent or direct opposition to it at that time.

On 8-10-09 the Department submitted their Opposition to Termination (Ex. 41), which failed to address any of the legitimate points raised by the Respondent in the Motion ot Terminate. On 8-13-09 the Respondent then submitted his Reply to the Department's Opposition, wherein he addresses, in turn, each argument raised by the Department (Ex. 47).

On 8-26-09 the Immigration Judge issued her Oral Decision, ordering the Respondent removed from the United States.

III. Arguments

1. The Immigration Judge relied on an unauthenticated declaration of an officer who was not available for cross-examination

In her Oral Decision the Immigration Judge relies upon "a sworn declaration from a deportation officer with Canadian Border Services Agency". Supposedly this deportation officer, one Steve Jacob, verified the biographical information of the Respondent: "specifically, that the respondent was born on November 24, 1973,

in Sudbury, Canada..." (OD page 3).

The Immigration Judge also relied upon this declaration to authenticate the passport submitted by the Department as exhibit 9.

The Respondent argues, however, that the declaration of Steve Jacob, submitted as an exhibit/attachment to exhibit 13 by the Department is inadmissable because the officer, Mr. Jacob, is not available for, and the Respondent has not been provided the opportunity to, cross-examine Mr. Jacob. See Murphy v. INS, 54 F.3d 605, 611 (9th Cir. 1995) (without the officer's testimony on cross-examination, the statement is subject to speculation and hardly worthy of full evidentiary weight), also, quoting Martin-Mendoza v. INS (approving the hearing officer's determination that the "weight [of a sworn statement] is necessarily impaired by the fact that the affiant could not be presented for cross-examination").

In addition, the declaration was obtained specifically in support of the removal proceeding against the Respondent and, therefore, the Immigration Judge should have known that Mr. Jacob would have to be available for cross-examination if the declaration is to be afforded any evidentiary weight, see Murphy v. INS, Id at 611 (Because Wills prepared the statement specifically "in support of [the] deportation proceeding against Travis Murphy", the lack of a date and the failure to verify and/or notarize the statement is especially worrisome and casts significant doubt on its trustiworthiness.)

The Respondent had raised these arguments in his "Brief in Opposition to Department's Brief Dated 5-19-08", admitted as exhibit 22, however, the

Immigration Judge failed to rule on, respond to, address, or acknowledge the arguments presented therein.

Finally, the use of the statements against the Respondent, by parties without the opportunity for the Respondent to confront or cross-examine such parties unquestionably deprives the Respondent of due process under the Fifth Amendment.

For the reasons presented the Respondent asserts that the Immigration Judge erred in considering the declaration of Steve Jacob and in using it, in part, as a basis for her final decision.

2. The Immigration Judge erred in relying on an unauthenticated I-213 in her final decision

In her oral decision the Immigration Judge relies upon an I-213 (Ex. 18) which has been disputed and has not been authenticated. Before proceeding, it is important to note that the Immigration Judge incorrectly refers to the I-213 as the I-261 on page 3 of her Oral Decision (OD).

On 5-20-08 the Respondent moved to suppress the I-213, and the information contained therein, however, the Immigration Judge failed to rule on that motion prior to issuing her oral decision.

The Respondent asserts that the information on the I-213 used by the Immigration Judge was not provided by him and was not verified or authenticated.

The information on the I-213 was provided by IEA Jason Martin following the Respondent's arrest by ICE. Agent Martin obtained the information from a Maricopa County Seriff's booking form which was filled out by Maricopa County Sheriff's Deputy Ryan Paschke, supposedly at the time the Respondent was being booked into the Maricopa County Jail on 7-25-07 (ER page 38, lines 11-24). Neither IEA Martin nor Deputy Paschke were available for cross-examination or to provide testimony as to where or how they obtained the information that is provided on the I-213.

Turning again to Murphy v. INS, the Court states: (the unauthenticated I-213 merits little (if any) weight, as acknowledged by the BIA. Murphy disputed the significant information, such as place of birth, names of parents, and use of the aliases "Trevor" and "Robert Williams".) Id at 610. Also (Most prejudicial to Murphy, there was no testifying witness subject to cross-examination to verify the source of the information) Id at 611.

As in Murphy, the Respondent's I-213 was unauthenticated and the maker(s) were specifically not available for cross-examination. Therefore, the use of that I-213 in the instant matter clearly violates due process, and the right to confrontation.

It is for this reason that the Respondent declares that the Immigration Judge erred in relying upon the I-213 in preparing her oral decision.

3. The Department failed to meet the burden of proving the Respondent's alienage

On 4-28-08 the Department submitted, as a proposed exhibit, a document purported to be the Respondent's foreign passport (Ex. 9). The passport bears a name similar to

the Respondent's and the picture of a person only vaguely resembling the Respondent.

On 5-5-08, before Immigration Judge Steven Ruhle, in open court, the Respondent denied knowledge of the foreign passport and asserted that he was not the person depicted in the photograph. Judge Ruhle then ordered the Department as follows:

> What I need from the Government, if you intend to prove this case...is a document comparing the Respondent's fingerprints...with the individual depicted on the passport... (ER page 31, lines 19-22).

At that same hearing the Department attempted to link the Respondent to the passport by falsely stating:

> We obtained the passport from the Phoenix Police Department, and they obtained it from the vehicle that Mr. Riess was driving when he was arrested by the Phoenix Police Department (ER page 30, lines 4-7).

At that hearing the Respondent corrected the Department's misstatement by informing the Court that the passport was, in fact, seized from a third party, who is not affiliated or associated directly with the Respondent, during the commission of a crime involving the use of the passport. This is supported by the Phoenix Police Reports relating to that particular arrest and investigation. A copy of this police report was provided to the Court as an exhibit/attachment to the Respondent's Reply to Department's Opposition to Termination, dated 8-13-09, and admitted as exhibit 47 in this matter. Contrary to the Department's statement the passport was seized by the Phoenix Police on 4-4-07, whereas the Respondent was arrested on 7-24-07. This is significant because the Respondent denies any knowledge or ownership of the passport. If, in fact, the passport was found in the Respondent's possession it would be reasonable to presume it was his. However, since it was, in fact, found in the possession of another person, who fits the Respondent's general description, and who was using it in the commission of a crime it is then much more reasonable to deduce that it is not, in fact, the Respondent's passport.

In point of fact, the Department has failed to connect the Respondent to the passport entered as exhibit 9. Further, they have failed to obtain fingerprints from Canada which match the Respondent's fingerprints. However, they claim, to this day, the Respondent was arrested in Canada. If this were true then the Canadian authorities would most certainly have the Respondent's fingerprints on file and the Department would have been able to match his fingerprints with those.

The Respondent submitted his objection to the Department's submission of the passport as evidence (Ex. 10) on 5-7-08, as well as a motion to suppress the passport (Ex. 21) on 5-26-08. However, the Immigration Judge failed to respond to, or address, either of these documents prior to issuing her decision.

Other than the passport, which the Department has failed to link to the Respondent, the Department has failed to provide any evidence of the Respondent's alienage.

Finally, seeing that Judge Ruhle would not accept the Department's unfounded allegations without supporting evidence and realizing that such evidence simply does not exist the Respondent's Deportation Officers cooked up a scheme to bring criminal charges of Perjury (18 USC §1621) and False Personation, US Citizen (18 USC §911) against the Respondent. In this way they could release him from DHS custody and transfer him to the custody of the USMS before the Immigration Judge has a chance to rule on the matter. Also, these specific charges could serve to discredit the Respondent and create a false impression of alienage.

Upon being returned to DHS custody, ten months later, the Respondent's case was reassigned to Immigration Judge Linda Spencer-Walters who proceeded without

addressing or ruling on the Respondent's Motion to Suppress the passport admitted by the Department.

In support of their allegation that the passport submitted as exhibit 9 is the Respondent's the Department submitted a supposed declaration from a Steve Jacob, a Canadian Immigration Officer (attached to Ex. 13) attesting to the authenticity of the passport. This declaration, however, does not attempt, nor could it, to authenticate the Respondent as the person pictured and named on the passport. Furthermore, the Respondent was not afforded the means, nor the opportunity to cross-examine Mr. Jacob. The Respondent raised an objection to the Department's submission of this supposed declaration of Mr. Jacob in his "Brief in Opposition to Department's Brief Dated 5-19-08" which was dated 5-30-08 and was admitted as exhibit 22 (see Ex. 22, pages 3-8). However, the Immigration Judge erred in failing to rule on the Respondent's objection prior to issuing her decision and considering Mr. Jacob's declaration without providing the Respondent a means of cross-examining Mr. Jacob. Therefore, Mr. Jacob's declaration must be considered unauthenticated hearsay and must be suppressed.

It is the Respondent's opinion that, even with the admission of the passport submitted by the Department, they have failed to meet the burden of establishing the alienage of the Respondent because they have failed to establish that the Respondent is the person named and pictured on the passport. Presumably, the Department can submit a foriegn passport containing a picture of a male with brown hair and brown eyes and claim it is the Respondent.

4. Canadians present without entry documents are to be treated as duration of status

cases

In her oral decision the Immigration Judge stated:

> The burden now shifts to the respondent to prove by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior admission. (OD page 4).

However, as the Respondent provided, previously, in his "Motion to Terminate Removal Proceedings", dated 7-16-09 (Ex. 32):

> The State Department advises that a Canadian who enters the United States following inspection by an immigration officer but who receives neither a visa nor an I-94 is treated as a duration of status case. Therefore, such a non-citizen may begin to accrue unlawful presence only when an immigration judge or the immigration agency makes a finding of violation of status.
>
> - State Department Cable, no file number (Nov. 7, 1998), reprinted in 4 Bender's Immigr. Bull. 1103 (Nov. 15, 1999), 76 Interpreter Releases 1552 (Oct. 25, 1999).

In her "Findings and Analysis" the Immigration Judge makes no reference to this published special handling of Canadians who have not been issued visas or entry documents, even though the issue was raised by the Respondent as a basis for terminating the removal proceedings.

It is the Respondent's assertion that the Immigration Judge erred in neglecting this very pertinent declaration by the State Department because it relates directly to the Department's allegations against the Respondent. Namely that he is a Canadian within the United States who is not in possession of a visa, I-94 or other entry document.

Based on the State Department's statement a Canadian citizen who lacks an entry document is to be treated as though he is a duration of status case, in other words, as though he had an I-94 with no expiration date.

Again, the Department alleges the Respondent is a Canadian citizen and national and that he lacks an entry document (which is implied from the alleagation of unlawful entry). And the Court finds that the Department has sufficiently established this. However, this is not sufficient basis to find the Respondent removable or inadmissable - based on the State Department's statement. The Immigration Judge must have had to have found the Respondent to be in violation of status first. Only then could unlawful presence begin to accrue.

Based on her oral decision the Immigration Judge did not take these factors into account and for this reason the Respondent asserts that the Immigration Judge erred in sustaining the charge of removability/inadmissability.

5. Canadians are exempt from entry document requirements

In addition to the declaration by the State Department, which was raised previously by the Respondent, there is the matter of the Department's exemption of Canadians from I-94 or visa issuance. This issue was also raised by the Respondent in his "Motion to Terminate", dated 7-16-09 (Ex. 32), and likewise, was not addressed or responded to by the Immigration Judge.

Specifically, the INS Inspector's Field Manual, section 15.1(b), provides:

> (4) Exemptions to Form I-94 Requirements. A Form I-94 is not required for the following classes of non-immigrants:
> (A) A Canadian national or other non-immigrant described in 8 C.F.R. §212.1(a) or 22 C.F.R. §41.33 admitted as a visitor for pleasure or business or in transit through the U.S.

Therefore, it is entirely reasonable that the Respondent, if he were a Canadian as the Department alleges, would lack an entry document or proof of lawful entry.

Furthermore, exactly two years had elapsed from the time of the Respondent's being taken into custody until the point of the Department and the Immigration Judge requesting proof of lawful entry. During that two years of detention the Respondent has lost every material possession, save for the clothes he was wearing at the time of arrest. Therefore, the Respondent believes it is entirely unreasonable for the Court to expect that he, somehow, could have saved a few pieces of paper, which relative to the magnitude of the other events occurring in his life at the time (unexpected, prolonged detention, complete loss of material assets, separation from his child, et cetera) would have seemed incredibly insignificant.

In addition, for many Canadians, taking a trip to the US is not such an uncommon occurrence as to warrant retention of receipts or proof of entry.

Given these factors it is very reasonable to believe, if the Respondent were a Canadian (and he by no means suggests that he is), the Respondent would not have access to documents which could possibly show time, place, and manner of entry.

Therefore, the Immigration Judge erred in basing her decision on the Respondent's lack of, or inability to produce, entry documents or evidence of lawful entry.

It is entirely possible, and reasonable, if the Respondent were a Canadian, that he may have entered the US within the six months immediately preceding his arrest and detention, as a visitor for pleasure, on a B-2 visa and, as provided by DHS policy at that time, not been issued an I-94 or other entry document upon admission. After all, the Respondent <u>was</u> lodging in a hotel and driving a rental

car, at the time of his arrest and detention. Both the Department and the Court conceded that this a very reasonable possibility.

Finally, see Matter of - (28 Immig. Rptr. B2-91 AAO Designation : N/A : Matter of - :: Dec. 16, 2003), which provides:

> ...notwithstanding lack of I-94 documentation evidencing lawful entry into U.S. because Canadian citizens are exempt from issuance of I-94 for non-immigrant travel to and through the U.S. in accordance with INS Inspector's Field Manual...

The BIA, in Matter of -, also states:

> The applicant, in this case, arrived in the United States from Canada as a visitor, with a Canadian passport and a U.S. visa. Based on section 15.1 of the Inspector's Field Manual, it is, therefore, reasonable to conclude that the applicant was not issued a Form I-94 upon her arrival in the United States.

Again, these matters were raised by the Respondent in his Motion to Terminate, however, the Immigration Judge erred in failing to consider them in making her decision.

IV. Summary

The Department, acting with no evidence of alienage whatsoever, arrested and detained the Respondent, then initiated removal proceedings against him. All the while the Respondent asserted, clearly and unequivically, that he was a U.S. citizen, born in California, to U.S. citizen parents. Nonetheless, with the blessing and assistance of the Immigration Judge (Keenan) the Department continued to detain the Respondent for months while they attempted to obtain even a single piece of evidence which may suggest he might be an alien.

When the Department eventually came across a mildly conincidental artifact, in the

from a foreign passport, which they were unable to link to the Respondent and the Immigration Judge (Ruhle) refused to accept, on its own, as the sole proof of alienage, the Department, rather than conceding they may have made a mistake, brought bogus criminal charges against the Respondent in order to further detain him. Although he was offered a plea agreement of time served only one month after being indicted the Respondent refused to plead guilty to charges he was innocent of.

Upon his return to DHS custody the Department, with no new evidence of alienage, sought to obtain a removal order as expeditiously as possible. The Immigration Judge (Spencer-Walters), without consideration for the authenticity or validity of the Department's allegations, statements or submitals, and without considering the Respondent's claims or arguments proceeded to issue her oral decision, ordering the Respondent removed from the United States.

The Respondent declares that the Department has failed to meet it's burden of establishing alienage and, given that they have had over two years to accomplish what should have been the very first step in the process, it is clear that they will never establish his alienage for one simple reason: he is not an alien.

Even assuming arguendo, the Department's allegation that the Respondent were Canadian were true, then pursuant to the Department's own policy he would be exempt from entry document requirements. And pursuant to State Department policy a Canadian present without a visa or entry document must be treated as a duration of status case until he is found to be in violation of status. In other words, a Canadian without proof of entry cannot be deemed to be unlawfully present nuless he either 1) admits or concedes to entering unlawfully, or 2) is currently barred from

entering as a result of a prior order of removal. Of course, as the Respondent has clearly and unequivocally asserted his U.S. citizenship and never suggested the contrary this is moot and presented only for the sake of argument and completeness.

Wherefore, based on the foregoing the Respondent respectfully requests this Honorable Board remand this case back to the Immigration Judge for a reversal of the order of removal and termination of removal proceedings with prejudice, and that the Respondent be unconditionally released from custody forthwith.

I declare under penalty of perjury that the foregoing is true and correct. 28 USC §1746.

Dated: 10-27-09

Signed: Richard S. Riess

Certificate of Service

I, Richard S. Riess, hereby certify that on the date indicated below copies of the attached document were delivered to the Board of Immigration Appeals and the counsel for the Department, by placing a copy in a sealed envelope and depositing them with the Institutional Mail System at the Eloy Detention Center, to be forwarded by the United States Postal Service, addressed as follows:

Board of Immigration Appeals
Clerk's Office
P.O. Box 8530
Falls Church, VA
22041

Assistant Chief Counsel
U.S. Department of Homeland Security
1705 East Hanna Road
Eloy, AZ
85131

Dated: 10-27-09

Signed: 
Richard S. Riess