Rodriguez Acosta

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Richard S. Riess
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Eloy, AZ 85231

NFTS'd 7/22
to Alec

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BEFORE THE IMMIGRATION COURT
ELOY, ARIZONA

In the matter of:	In Removal Proceedings
Richard Steven Riess	
File No.: 088-664-582	Respondent's Motion to Terminate Removal Proceedings
Phoenix, Arizona	

The Respondent respectfully moves the Court to Terminate Removal Proceedings in the above captioned matter.

The Department alleges the Respondent is a native and citizen of Canada. And that he entered the United States without being admitted or paroled. The Department, therefore, charges that the Respondent is inadmissable, and subject to removal pursuant to §212(a)(6)(A)(i) of the INA.

The Respondent asserts the Department is incapable of proving their allegation of unlawful entry or unlawful presence. And, further, their allegations, in fact, would not render the Respondent removable.

We must first consider whether or not the Department can prove their allegation that the Respondent entered the United States without being admitted or paroled. See 28 Immig. Rptr. B2-91 AAO Designation : N/A : Matter

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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 Service Inspector's Field Manual, Section 15.1(b), states:
>
> (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.
>
> Section 15.1(b) further states, in part:
>
> Issue an I-94 to each Canadian non-immigrant (or Canadian landed immigrant) entering for other than visits for business or pleasure (B1 or B2).
>
> 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."

And 8 C.F.R. §212.1(a)(1) provides:

> "Canadian citizens. A visa is not required. A passport is not required for Canadian citizens entering the United States from within the Western Hemisphere by land or sea..."

In addition, "Immigration Law and Procedure", Release No. 123, December 2008,

by Gordon, Mailman and Yale-Loehr, in §12.07(2)(b) states, with respect to

I-94 issuance:

> "The requirement of a completed I-94 applies to every admitted non-immigrant with certain specific exceptions. These exceptions, sometimes called nonstatistical entries, include entries by Canadian citizens and British subjects residing in Canada or Bermuda who are entering the United States as visitors for business or pleasure (B-1 or B-2) for less than six months."

And §8.05(2)(c) says, regarding manner of inspection:

> "The thoroughness of the examination will vary with the circumstances and the place; at the northern border, for example, local Canadians who

> obviously know the routine or are personally known to the inspectors and are entering as nonimmigrants or returning residents, have been waved through without questions."

Quite clearly, in the case of Canadian citizens, the lack of I-94 documentation cannot be considered evidence of unlawful entry or unlawful presence because Canadian citizens are exempt from I-94 issuance for non-immigrant travel.

With respect to the burden of proof, generally, in the case of aliens accused of being present in the United States without being admitted or paroled the burden is on the alien to prove he is lawfully present pursuant to a prior admission. This cannot apply to the case of Canadian citizens because, as stated, they are exempt from the I-94 requirement. If the Department does not issue the Canadian an entry document, nor require the Canadian to possess an entry document, how, then, can the Canadian be expected to prove he was admitted?

In response to that question the Department treats Canadian citizens who lack an I-94 or other proof of admission as duration of status cases, as is explained in the following State Department cable:

> "The State Department advises that a Canadian who enters the United States following inspection by an immigration officer but who received neither a visa nor an I-94 is treated as a duration of status case. Therefore, such a noncitizen 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).

And to clarify the Department's position on duration of status cases, in

general, see the following memorandum:

> "For noncitizens who are in duration of status (D/S), meaning they have no fixed end date on their I-94 card, unlawful presence does not begin to accrue when removal proceedings begin, but rather only when the immigration agency finds a status violation while adjudicating a request for an immigration benefit or if an immigration judge finds the individual removable."
>
> - Memorandum from Michael Pearson, Executive Associate Commissioner, INS Office of Field Operations, to Regional Directors, File No. HQADN70/ 21.1.24-P (Mar. 3, 2000) (amending INS Adjudications Field Manual §30.1(d)), reprinted at 77 Interpreter Releases 313 (Mar.13, 2000), 5 Bender's Immigr. Bull. 286 (Mar. 15, 2000).

If the Court is to accept the Department's allegation that the Respondent is a Canadian citizen then, in the absence of physical evidence or a confession by the Respondent that he entered the United States without being admitted or paroled, the Court and the Department must treat his case as though it were a duration of status case.

In other words, the Respondent cannot be found to be removable based on an allegation of unlawful entry or unlawful presence.

For the reasons presented herein it is clear that the Department's allegations cannot be proven and cannot be used as a basis for finding the Respondent removable. Therefore, the Respondent requests the Court terminate removal proceedings in this matter without further delay.

Dated: 7-16-09

Signed: _____
Richard S. Riess

Certificate of Service

I hereby certify that a true and correct copy of the attached document has been served upon opposing counsel by placing a copy in a sealed envelope and depositing it with the Inter Office Mail system at the Eloy Detention Center, addressed as follows:

Assistant Chief Counsel
US Department of Homeland Security
1705 E. Hanna Rd
Eloy, AZ 85231

Dated: 7-16-08

Signed: _____
Richard S. Riess