

**SUMMARY OF THE CASE**

This is an immigration case in which the alien petitioner, Vuyiswa Y. Nyirenda, seeks review of a final order





**II. STATEMENT OF THE ISSUE PRESENTED**

Whether the BIA erred in determining that the petitioner's action of driving through a United States border checkpoint, and traveling two to three miles into the United States before her apprehension by immigration officials, constituted an "entry" under immigration law.

---

The undersigned attorney is not aware of any cases currently before the Court presenting the same issue.

---

:  
United States v. Pacheco-Medina, 212 F.3d 1162 (9th Cir. 2000)  
Cheng v. INS, 534 F.2d 1018 (2d Cir. 1976)  
United States v. Martin-Plascencia, 532 F.2d 1316 (9th Cir. 1976)  
Matter of Z-, 20 I. & N. Dec. 707 (BIA 1993)  
Matter of Pierre, 14 I. & N. Dec. 467 (BIA 1973)

---

:  
Section 101(a)(13) of the INA, 8 U.S.C. § 1101(a)(13) (1994)  
Section 212 of the INA, 8 U.S.C. § 1182 (1994)  
Section 236(a) of the INA, 8 U.S.C. § 1226 (1994)  
Section 241(a) of the INA, 8 U.S.C. § 1251 (1994)

III. STATEMENT OF THE CASE

A. Nature of Case And Course of Proceedings

The petitioner was born in South Africa and is a citizen of



In an April 12, 1996 decision, the immigration judge found that



---







C.

---

<sup>4</sup> A lawful permanent resident who makes a "brief, casual, and innocent" trip abroad is not considered to have made an "entry" on return because such short absences are treated as though they did not break the alien's continuous physical presence in the United States. Therefore, under 1995 law, an immigration officer who became aware of a ground of deportability while inspecting a lawful permanent resident who was returning from brief, casual, and innocent trip abroad would put the alien in deportation proceedings rather than exclusion proceedings. The petitioner's trip was not "innocent," since it was admittedly for the purpose of smuggling her children into the United States, and thus her lawful permanent resident status does not obviate the need for determining if she made an entry.

off as she went through the checkpoint because she was playing music on the car radio. The immigration judge and the BIA found that her assertion that she did not know she had gone through the checkpoint was not credible, and they gave several reasons for this finding.

First, they noted that the evidence in the record showed that the checkpoint would be very hard to miss. There are several large signs on the highway approaching the Pembina checkpoint that announce the checkpoint. A.R. at 266, 318-19. The highway runs right through the checkpoint, so even if a person does not notice the signs he or she cannot miss the checkpoint itself. A.R. at 264, 300, 320-21. The checkpoint consists of a building abutting the highway with an overhang that extends over two lanes of the highway and a booth for each lane. A.R. at 304. The third, rightmost lane does not have an overhang because it is the lane for large trucks, but it has a booth abutting it and two plainly visible stop signs. A.R. at 89, 91, 306. There are large signs immediately in front of the checkpoint instructing motorists to "report for inspection" and directing light vehicles into the proper inspection lane. A.R. at 88, 300, 304. The overhang has a large banner sign across the top reading: "United States Border Inspection Station - Pembina, North Dakota." A.R. at 86, 94, 304. There are "red and green lights in each lane." A.R. at 90 (testimony of immigration officer). It defies belief that the

---

<sup>5</sup> The petitioner asserts in her brief, at page 11,

at 170 (petitioner admitted braking right after going through checkpoint), 251. Her claim to have been listening to loud music is also inconsistent with her admitted plan to pass her children off as sleeping in the back seat when she passed the checkpoint, in the hope







she crossed into the United States from Mexico without inspection in 1985), 142-43 (vague testimony that she worked on a farm for 90 days,



was inside the border checkpoint building when he was alerted that a

testified that it was "within a minute" from time he was told about the run through until he had gotten into his car and sighted petitioner's car). Mr. Guttu testified that he had caught up to the



not even in the sight of any official for about one minute, while Mr. Guttu got his car keys, got into his car, and got close enough to see her car. The petitioner states that she was under control of officials because she was within sight of Mr. Guttu before she came to the first exit from the freeway and could have escaped, but that is on the point. The Ninth Circuit has held that the important point is on whether the alien is successful in evading the authorities, but whether the alien at some point is on under the control of authorities and can choose his or her actions. See Martin-Plascencia, 532 F.3d at 1317. In Martin-Plascencia, where the alien was trying to climb a concrete wall and escape when he was apprehended moments after he crossed into the United States, the court did not base its decision on whether it was physically possible for the alien to have climbed the wall or whether there was any other way to escape; instead, it based its decision on the fact that the alien was "exercising his free will." Id. at 1317. In the instant case, the petitioner was exercising her free will in driving down the freeway. Mr. Guttu did not catch up to her until she had passed the first exit from the highway, which means that she could have taken that exit and tried to get away from him. She could also have sped up and tried to outrun him. Or, during the minute that she was out of sight of authorities, she could have pulled the car to the side of



the road and run. The fact that she did not choose to do any of these things, and instead apparently chose to drive normally and hope that she had not been identified and would not be pulled over, is not relevant since she was able to exercise her free will. See Martin-Plascencia, supra.

The Second Circuit has held that an entry was made where aliens crossed the border from Canada and proceeded four-tenths of a mile into the United States before a Border Patrol agent notified the 960t

STUART E. SCHIFFER  
Acting Assistant Attorney General  
Civil Division



CERTIFICATE OF VIRUS-FREE DISKETTE

CERTIFICATE OF SERVICE

I certify that on the 6th day of July, 2001, I directed that an envelope containing two copies of this **Brief for Respondent** be deposited in a United States Department of Justice mailroom, in sufficient time for same day collection, addressed to Petitioner's counsel:

Rachel N. Sampong, Esq.  
1101 E. 28th Street  
Minneapolis, MN 55407

---

SUSAN HOUSER  
Attorney  
Office of Immigration Litigation  
Civil Division

TABLE OF CONTENTS

SUMMARY OF THE CASE

STATEMENT REGARDING ORAL ARGUMENT

I. STATEMENT OF JURISDICTION. . . . . N 1i