STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

REFUGIO S. BRIBIESCA,

Plaintiff,

vs.

MEMORANDUM DECISION AND ORDER
Case No. 91CV3076

LABOR AND INDUSTRY REVIEW COMMISSION and MADISON MUSHROOMS, INC.,

Defendants.

The plaintiff, Refugio S. Bribiesca, seeks judicial review of a July 10, 1991 decision of the defendant, Labor and Industry Review Commission (LIRC) which determined that Bribiesca was ineligible for unemployment compensation (UC) benefits based on services he performed for the defendant, Madison Mushrooms, Inc., in 1984 and which required him to repay the sum of $1,116 which he had previously received. Because the undisputed facts call for only the one conclusion that Bribiesca was not eligible for UC benefits based on work performed in 1984, LIRC's decision must be affirmed.

It is undisputed that Bribiesca was an alien at the time he worked for Madison Mushrooms in 1984. Under sec. 108.04(18)(a), Wis. Stats., the work performed by an alien may not be used to qualify for UC benefits "unless the employe is an alien who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for the purpose of performing such services, or was permanently residing in the United States under color of law [(PRUCOL)] at the time such services were performed." Bribiesca concedes that in 1984 he was neither "lawfully admitted" or "lawfully present" when he performed the work at issue. Instead, he asserts he was PRUCOL at that time.

Bribiesca does not challenge the factual findings made by LIRC, and the background appears to be undisputed. In 1979, Bribiesca and his wife were granted permission to apply for a visa to enter the United States from Mexico under a petition filed by his mother-in-law, an American citizen. He did not have his birth certificate which the Immigration and Naturalization Service (INS) required, and he was unaware then that an alternate form of proof could be submitted. His wife obtained a visa but he did not. Thus when they both entered the country in 1979, she did so legally but he did so illegally.

On July 21, 1981, Bribiesca's wife contacted the INS and submitted the necessary documentation to complete his application to obtain a visa. While it appears clear that he had met all of the eligibility requirements, no visa could be issued until he was interviewed to complete the process. Several months later, Bribiesca returned to Mexico because his mother was ill. On November 25, 1981 he wrote to the INS to tell them of his change of address to Mexico. A notice for an interview on December 17, 1981 was nonetheless sent to him at the Wisconsin address given the INS by his wife in July, 1991. Whether this was because of an error by the INS or because the notice was sent prior to the INS being advised of the new address is unknown. The record also does not reveal whether Bribiesca's wife or mother-in-law received the notice for the interview and, if so, why they did not advise him of the date. In any event, Bribiesca did not attend the interview or ask to have it rescheduled because he was unaware of it.

In 1983 Bribiesca returned to the United States without an immigrant visa or any INS authority to do so. In 1984 he performed the weeks of service at Madison Mushrooms which are at issue here. In late 1984 he was laid off through no fault of his own. On October 22,

1985 he and his wife recontacted the INS and again presented the documents submitted in July, 1981. As of that date he was officially "employment authorized" for one year. Within that year he had to either gain a more permanent status or leave the country. On October 9, 1986, Bribiesca was granted permanent residence status.

It is clear from the statutory language of sec. 108.04(18)(a), Wis. Stats. that the focus is on the alien's status at "the time such services were performed." This conclusion is confirmed in Pickering v. LIRC, 156 Wis. 2d 361, 368 (Ct. App. 1990). Accordingly, here the analysis must focus on Bribiesca's status in 1984.

Bribiesca argues that the simple failure of INS to take action to deport an alien is sufficient to show its intent to authorize the alien's continued residence and to thus confer PRUCOL status. He cites several decisions from other jurisdictions with similar statutes to support this proposition and relies on the undisputed fact that no deportation efforts were ever taken against him. Moreover, he asserts, relying on Gillar v. Employment Division, 717 P.2d 131, 136 (Or. 1986), that where the INS has a specific policy against deportation of certain individuals, individuals covered by the policy are PRUCOL for so long as they are so covered. In this regard, he points to INS Operations Instructions 242.1a(23) which provides,

> Pending final adjudication of a petition which has ben filed, the district director will not deport, or institute proceedings against, the beneficiary of the petition if approval of the petition would make the beneficiary immediately eligible for adjustment of status under §245 of the Act or for voluntary departure under the Service policy set forth in Operations Instructions 242.10(a)(6)(i). The district director may, however, seek to deport or institute proceedings against the beneficiary when it is determined that the petition is frivolous or there are substantial adverse factors which, based on the district director's opinion, would probably lead to denial of adjustment of status or extended voluntary departure in the exercise of discretion.

He contends that he was covered by this policy because he had the petition on file in 1984

that his wife had submitted in 1981.

LIRC supports its decision by arguing that PRUCOL status may only be conferred when the INS provides an individual official assurance that deportation is not planned in some written form. It cites the Unemployment Insurance Program Letter No. 1-86 (10/28/85) issued by the U.S. Department of Labor (DOL) to support this position and language in Pickering, supra 156 Wis.2d at 369 which approves the use of such letters as "indicia of legislative intent." Since it is undisputed that the INS had not as of 1984 issued Bribiesca any written assurance of non-deportation, LIRC reasons that he could not be PRUCOL at this time.

Under the facts presented here, it is unnecessary for the court to resolve whether the narrow view of PRUCOL used by LIRC or the somewhat wider definitions urged by Bribiesca should be adopted. In particular, it is unnecessary to address whether PRUCOL status may only be conferred by affirmative, case-specific and written action by the INS.[1] Even under the cases cited by Bribiesca, he does not qualify as PRUCOL.

The threshold case addressing the meaning of PRUCOL, and the one cited in all of

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[1] The construction of a statute and its application to undisputed facts present questions of law. If an agency's determination on such a question involves its experience and specialized knowledge and is consistent with an uniform and longstanding policy, the agency's determination is entitled to "great weight". Sauk County v. WERC, 165 Wis.2d 406, 413-14 (1991). Only if an agency determination entitled to great weight is irrational should a court not defer to it. Beloit Education Assn. v. WERC, 73 Wis.2d 43, 67 (1976). Here LIRC's construction of PRUCOL, based on the DOL Letter, has been shown to have been consistently followed in several prior cases before the agency. While it may not be the one this court would adopt were I writing on a blank slate, it cannot be seen as irrational. Thus were it necessary to address the parties' competing views of what the INS must do to demonstrate its acquiescence in an alien remaining in this country, the result would be the same.

the decisions relied upon by the parties to this case, is Holley v. Lavine, 553 F.2d 845 (2nd Cir. 1977). While Holley arose in an AFDC setting, its discussion of the meaning of PRUCOL has been relied upon in a variety of settings, including UC eligibility. There the court stated,

> "The phrase ["under color of law"] obviously includes actions not covered by specific authorizations of law. It embraces not only situations within the body of the law, but also others enfolded by a colorable imitation. "Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative agency or a legislative body uses the phrase "under color of law" it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border.
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> There is no more common instance of actions "under color of law" than the determination of an official charged with enforcement of the law that he, as a matter of public policy, will exercise his discretion not to enforce the letter of a statute or regulation because such enforcement would involve consequences, or inflict suffering, beyond what the authors of the law contemplated." 553 F.2d at 849-50.

The clear focus is on the actions taken by the INS, whether by virtue of power or of right. PRUCOL does not arise because of the circumstances of the alien. It derives from the response of INS to those circumstances. Gillar, supra at 136. What is implicit in the concept is a decision, whether reflected by acts of omission or commission, to permit the alien to reside or continue to reside in this country. Fundamental to the notion of a decision is knowledge of the alien's presence in the country. There can be no decision to permit continued presence without knowledge of that presence in the first instance.

The cases relied upon by Bribiesca affirm this very principle. In Rubio v. Employment Division, 674 P.2d 1201, 1203 (Or. App. 1984), the court stated, "His residence was also under 'color of law' because INS knew of it and, by its routine regular

extensions of his voluntary departure, had acquiesced in it." (Emphasis added). In Antillon v. Department of Employment Sec., 688 P. 2d 455, 459 (Utah 1984), the court concluded, "Antillon's residence was therefore under color of law because the INS knew of it and acquiesced in it by exercising its discretion not to enforce the law." (emphasis added). Likewise, in Lapre v. Department of Employment Sec., 513 A. 2nd 10, 13 (R.I. 1986), the court found her PRUCOL relying on the fact that "during the time Lapre was employed in the Pawtucket shop, INS was aware of her permanent residence and indeed acquiesced in her continued residence, for it took no steps to deport her." (emphasis added). Thus before any consideration of the form by which INS expresses its acquiescence needs to be undertaken, the sine qua non is that INS is aware of the alien's presence in this country.

The question here, then, is what was the state of INS knowledge about Bribiesca in 1984, for as noted earlier, the statute and Pickering require a time specific analysis. It is undisputed that in 1981, Bribiesca had returned to Mexico and had so advised the INS. Until he presented himself to the INS in October of 1985, there is not a scintilla of evidence to establish or even suggest that the INS knew he had returned. Moreover, Bribiesca's letter to the INS advising them he was in Mexico and providing a Mexican address gives no indication of his intent to or a date for his return to this country. Under such circumstances, there is no basis to conclude that the INS knew he had returned and was therefore able to acquiesce in his continued presence.

Likewise, the INS policy cited earlier provides Bribiesca no assistance. This is a policy to not deport an alien under certain circumstances. Such a policy has no application to a person who is not in the country because there is no need or ability to deport. Thus LIRC

has satisfied its burden under sec. 108.04(18)(a) to show by "a preponderance of the evidence" that Bribiesca was not PRUCOL in 1984.[2]

Bribiesca nonetheless argues that public policy considerations require that illegal aliens, like himself, should be eligible for benefits. He cites no authority to support the proposition that a state cannot exclude illegal aliens from UC coverage based on their alien status. Instead, he relies on the broad public purpose for the UC program of providing economic security to workers who lose their employment through no fault of their own to reason that Bribiesca falls within the class that that law was designed to protect. While this may well be true, "the public policy declarations of the act may not be used to supersede, alter or modify its specific provisions." Salerno v. John Oster Mfg. Co., 37 Wis. 2d 433, 441 (1967). It is the legislature, not the courts, who define who will be the beneficiaries of the UC program; and where a person is found to be excluded by the legislature's definition, a court may not rewrite the law to impose its view as to who are worthy of benefits. This is so even when the employee has lost his job without fault on his part and thus the result is harsh. Spielmann v. Industrial Commission, 236 Wis. 240, 246 (1940). The other public policy arguments which Bribiesca offers are the type which are better addressed to the legislature.

For all of the foregoing reasons,

IT IS ORDERED that the July 10, 1991 Decision of LIRC is hereby affirmed and this action is dismissed.

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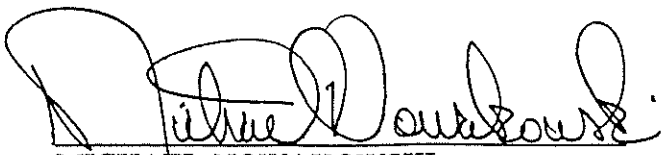
[2] The actions taken by INS after Bribiesca presented himself to its Milwaukee office in October, 1985 are irrelevant to his status in 1984.

Dated this 8th day of May, 1992.

BY THE COURT



MICHAEL NOWAKOWSKI
CIRCUIT COURT JUDGE

cc: Attorney Kevin G. Magee
Attorney David B. Nance