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IN THE SUPREME COURT OF THE STATE OF UTAH

BALTAZAR ANTILLON,

Plaintiff,

vs.

Case No. 19338

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY,

Defendant.

BRIEF OF BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY IN SUPPORT OF ITS PETITION FOR REHEARING

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BALTAZAR ANTILLON,

Plaintiff,

vs

Case No. 19338

BOARD OF REVIEW OF THE INDUSTRIAL
COMMISSION OF UTAH, DEPARTMENT
OF EMPLOYMENT SECURITY,

Defendant

BRIEF OF BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY IN SUPPORT OF ITS PETITION FOR REHEARING

Pursuant to Rule 76(e), Utah Rules of Civil Procedure, the Petitioner, the Board of Review of the Industrial Commission of Utah, Department of Employment Security, respectfully petitions this Court for a rehearing in the above entitled case. This petition is based on petitioner's contention that this Court erred in its conclusion that the claimant was residing in the United States "under color of law" because the Immigration and Naturalization

Service (hereinafter, the "INS") was aware of his presence and acquiesced therein by taking no action to deport him.

DISPOSITION BY THIS COURT

In an opinion filed on June 6, 1984 in the case of Baltazar Antillon v. Department of Employment Security, No. 19338, slip. op. (Utah, June 6, 1984) [hereinafter cited as Antillon], this Court reversed a decision of the Board of Review of the Industrial Commission of Utah which affirmed the decision of the Appeals Referee and denied unemployment benefits to the claimant on the grounds that he was an alien who had not been lawfully admitted into the United States and who had knowingly misrepresented his citizenship status in completing claim forms for unemployment benefits. In reversing the Board, the Court held that the claimant was entitled to unemployment benefits under Section 35-4-5(k)(1) of the Employment Security Act, Utah Code Ann., 1953, 1983 Pocket Supplement, (hereinafter, "the Act") because he was residing in the United States "under color of law" at the time he applied for unemployment benefits in 1981 and 1982.

STATEMENT OF FACTS

The facts of the case have been stated previously by the parties in their respective briefs. The Petitioner contends, however, that the following

findings of fact of the Court in the Antillon decision are in error for reasons discussed in POINT II and POINT III.

1. On page 2 of its decision the Court stated:

> In July, 1980, on a brief vacation to Mexico, Antillon filed papers to become a permanent resident of the United States with the American consul in Chilaualua [sic], Mexico. That application and accompanying records were later transferred to Salt Lake City, Utah, the closest Immigration and Naturalization Service (INS) office to Antillon's home address.

This finding is erroneous for reasons discussed in POINT II below.

2. On page 3 of its decision the Court made the following finding:

> No hearing date was ever set, no hearing has yet been held, and no further action has been taken by the INS on Antillon's application for permanent residency.

This finding is likewise erroneous for reasons discussed in POINT III below

Since the Court relied on and adopted these findings of fact in reaching its conclusion that the the Salt Lake INS office knew of and acquiesced in the claimant's residence in the United States, which in the Court's decision was the equivalent of residing in the United States under "color of law," the Court should reconsider its decision in this case.

ARGUMENT

POINT I

THE COURT FAILED TO RESPOND TO DEFENDANT'S ARGUMENT PERTAINING TO THE INTENT OF CONGRESS THAT BENEFITS BE DENIED TO THOSE ALIENS WHO ARE NOT LEGALLY AVAILABLE FOR WORK IN THE UNITED STATES, AND FURTHER ERRED IN ITS CONCLUSION THAT LEGAL ENTITLEMENT TO WORK IS NOT THE ISSUE IN ALIEN CASES.

Defendant argued in its original Brief that:

> . . . the underlying reason for disqualification of illegal aliens is that such individuals are not legally authorized to work and therefore cannot meet the availability requirements of the unemployment insurance laws.

Defendant's Brief, at 10, and cases cited therein. Defendant further argues that Congress amended the Federal Unemployment Tax Act to require states to deny benefits to such aliens. Defendant's Brief, at 10. In response to this argument the Court's decision states only:

> The test in this case is not whether Antillon initially entered this country illegally or whether he was legally entitled to work, . . . [Emphasis added.]

Slip Opinion, at 4. This conclusion is neither responsive to the argument made by Defendant nor is it correct.

Defendant will not rehash its argument pertaining to the general case law which denies benefits to illegal aliens on the grounds such individuals are not legally available for work. The case law is summarized in Annotation, "Aliens' Right to Unemployment Compensation," 87 ALR 3d 694. Obviously, the case law of other jurisdictions holding that illegal aliens are not

ible for unemployment benefits on the grounds they are not legally available for work is not directly in point with the instant case because the earlier cases were decided on the basis of availability provisions and not on Section 5(k) equivalents. However, the reasoning in those earlier cases is historically significant in light of the legislative history of 26 U.S.C. Section 3304(a)(14)(A).

The Court is correct in its statement that Section 35-4-5(k) of Utah's statute was enacted by the Utah Legislature as a condition of continued federal approval of Utah's unemployment compensation laws and that the construction of Utah's statute must be consistent with federal law. The legislative history of 26 U.S.C. Section 3304(a)(14)(A) is clear as to the purpose and intent of the federal amendment, as well as the purpose and intent of the phrase "under color of law" as it is used in this particular section of federal law.

Prior to 1976 there was no federal provision of law respecting the right of aliens to receive unemployment compensation. The question first arose in congressional debate during consideration of H.R. 10210, which subsequently became Public Law 94-566. During the House debates of H.R. 10210 Representative Sisk of California, on July 20, 1976, offered a floor amendment to the bill, which contained the following provision:

> (14) compensation shall not be payable on the basis of services performed by an alien who was not lawfully admitted to the United States;

Congressional Record--House, July 20, 1976, at 22910. Mr. Sisk explained that the reason for his proposed amendment was to prevent the payment of unemployment benefits to illegal aliens because they are not eligible to work. Referring to then-recent action by the State of California to no longer require unemployment insurance claimants to state whether or not they are citizens or legal aliens, he stated:

> This action can easily result in many illegal aliens drawing benefits to which they are not entitled. As we all know, the law requires that before unemployment benefits can be paid, the individual must be eligible for work. And illegal aliens are not. [Emphasis added.]

Ibid. Mr. Corman, also of California, then rose to speak in support of the proposed amendment, stating: "As to the illegal aliens, they should not be receiving UC now because they cannot be available for work." Ibid. (Emphasis added.)

The Staff Report for the Senate Committee on Finance also explained the purpose of the proposed amendment in the same terms:

> Illegal aliens.--The bill also prohibits payment of benefits to an alien not lawfully admitted into the United States. The provision is intended to deny benefits to those individuals because they cannot be legally available for work. [Emphasis added.]

Staff Data and Materials on Unemployment Compensation Amendments of 1976 (H.R. 10210), Committee on Finance, United States Senate, Sept. 3, 1976, at 57.

The phrase "under color of law" was first mentioned when H.R. 102[illegible] reached the Senate for consideration in September 1976. Senator Cranston [illegible]

alifornia proposed a floor amendment to the Sisk Amendment. He explained his modification of the Sisk Amendment in this manner:

> The purpose of the amendment is to provide standards for the administration of section 303 of the bill in order that innocent citizens and lawful permanent resident aliens will not be inadvertently denied or delayed payment of unemployment compensation benefits to which they otherwise are entitled.
>
> The purpose of the amendment is as follows:
>
> First, to define more precisely those individuals who shall not be paid unemployment compensation as aliens not lawfully admitted for permanent residence in the United States;
>
> Second, to establish a principle of nondiscrimination in the administration of the provision by requiring that data shall be uniformly required of all applicants; and
>
> Third, to provide that no individual shall be denied unemployment compensation under this provision except upon a preponderance of the evidence.

Congressional Record--Senate, September 29, 1976, at 33287. Senator Cranston then went on to explain that the Immigration and Naturalization Act is a very complex body of law and that unemployment compensation workers should not have to interpret it. Questions of citizenship should be asked of all claimants and decisions should be made on the basis of a preponderance of the evidence. Senator Cranston explained the objective of these requirements in the following manner:

> Unless a preponderance of the evidence is developed indicating that the individual is not lawfully admitted for permanent residence in the United States, the claim will be paid. These administrative provisions are consistent with the intent of the bill to deny unemployment compensation to aliens not lawfully admitted to the United States without unintentionally penalizing persons

> who are eligible as citizens or as aliens lawfully admitted for permanent residence. [Emphasis added.]

Ibid.

Senator Haskell of Colorado expressed his appreciation to Senator Cranston for resolving his concern that people not be denied benefits simply because of an assumption as to their legal status. Senator Haskell's explanation of his concern made the following reference to the underlying reasoning for denial of benefits to illegal aliens:

> Obviously we do not want to pay unemployment compensation to illegal aliens. On the other hand the administration of this prohibition must not have the unintended effect of discriminating against American citizens and persons legally residing in this country and eligible for work, simply because of their ethnic, racial, or linguistic characteristics. [Emphasis added.]

Ibid.

Section 3304(a)(14)(A) as contained in P.L. 94-566 allowed benefits only to those aliens who are permanently residing in the United States.

> (14)(A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in the United States under color of law. . . . [Emphasis added.]

The cited legislative history makes it apparent that Congress intended to grant benefits to such aliens based on their legal eligibility to work. However, after P.L. 94-566 was passed into law it soon became apparent that another class of aliens existed who are legally entitled to work in the United States even though they maintain their permanent residences in Canada or

[illegible] These people are international commuters. Thus another classifi-

[illegible] added to the statute in 1977 by P.L. 95-19, causing section

[illegible] to read:

> (A) compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed. . . . [Emphasis added.]

[illegible]gressional Record--Senate, March 30, 1977, at 9660. The amendment added the words "was lawfully present for purposes of performing such services, [illegible]" immediately preceding the color of law provision.

By simply reading 26 U.S.C. 3304(a) (14)(A) as amended by P.L. 95-19, without regard for its legislative history, it is easy to erroneously conclude that Congress already covered those aliens who are legally entitled to work with the phrase "was lawfully present for purposes of performing such services," and that, therefore, the phrase "under color of law" must have reference to some other category of aliens who may be eligible for benefits without being legally entitled to work. However, the legislative history of P.L. 95-19 clearly shows that such an interpretation is not correct.

During the congressional debates regarding H.R. 4800, which subsequently became P.L. 95-19, the House Ways and Means Committee reported a need to [illegible]arify the illegal alien denial for certain Canadian and Mexican citizens [illegible] lawfully work in the United States. The report stated:

> The current language of the required denial of benefits to certain aliens in Section 3304(a)(14)(A) would make ineligible certain Canadian and Mexican citizens who legally work in the United States and have heretofore been considered eligible for benefits. In addition, the language appears to conflict with Section 3304(a)(7)(A), FUTA, enacted in 1970. That Section prohibits a State from denying or reducing benefits to an individual solely because he files a claim in or resides in another State or Canada.
>
> A large part of the problem was resolved by the classification of many of these international commuters as premanent [sic] residents by the Immigration and Naturalization Service. The Supreme Court upheld this classification in Saxbe v. Bustos, 419 U.C. 65. However, an unknown number of Canadian nonimmigrant workers would still appear to be barred. Section 302(a) clarifies the situation by excluding from the prohibition aliens lawfully present in the United States for the purpose of performing the work on which benefits were based.

House Committee on Ways and Means, Report No. 95-82, at 11. The Senate Finance Committee report further confirmed the purpose of the amendment and made it clear that Congress still intended to deny benefits to any alien who illegally worked at the time he earned his base period wage credits, as the following statement clearly evidences:

> The House bill contains a technical correction to the provisions of present law intended to prevent the payment of unemployment compensation to illegal aliens who work in the United States. The present provision prevents the payment of benefits to certain Canadian and Mexican residents who legally work in the United States. The amendment which would be made by the bill is intended to permit benefits to be paid to these people. However, the determination whether benefits are paid these people would be based on their status at the time the benefits are claimed rather than on their status at the time the work was performed.
>
> The committee amendment, therefore, modifies the House-passed provision so that benefits would not be

paid to an individual who was illegally working at the time he earned his eligiblity for benefits. [Emphasis added.]

Senate Committee on Finance, Report No. 95-67, at 15.

Contrary to the Court's conclusion that the claimant's legal eligbility for work is not the test in unemployment compensation cases, the legislative history of 26 U.S.C. 3304 (a)(14)(A) shows that legal eligibility, and therefore availability, for work is the sole basis of the statutory provision. It must be noted that the cases cited by Plaintiff in Plaintiff's Brief and relied on by the Court in its decision in this case involved laws that used the phrase "under color of law" in a totally different context than it is used in 26 U.S.C. 3304 (a)(14)(A). The cases relied on by the Court were based on statutory provisions which were completely unrelated to the question of the individual's eligibility for work while in the United States.

Defendant cited in its original Brief the case of Duenas-Rodriquez v. Industrial Commission, 199 Colo. 95, 606 P. 2d 437 (1980), in which the Colorado Supreme Court stated:

> The courts have consistently held that aliens who enter the United States illegally have no constitutional right to work. See Pilopil v. Immigration and Naturalization Service, 424 F. 2d 6 (10th Cir. 1970); Ojeda-Vinales v. Immigration and Naturalization Serv., 523 F. 2d 286 (2d Cir. 1975); Zapata v. Levine, 50 App. Div. 2d 681, 375 N.Y.S. 2d 424 (1975).

An alien's right to work in the United States is governed by 8 C.F.R., Sections 109.1 and 109.2. These provisions are administered by the INS, which agency issues a "green card" to each alien who meets the qualifying requirements of the regulations. The effect of this "green card" was explained by

Congressman Corman, California, in a congressional debate concerning H.R. 4800 in 1977. Congresswoman Fenwick, New Jersey, made an observation and Congressman Corman responded as follows:

> Mrs. FENWICK. Madam Chairman, I have a question of the gentleman, or the chairman of the committee. A most curious case arose in my district. I wonder if this was proper under the bill. A worker was let go only because the worker was discovered to be working without a green card; in other words, had come in on a visitor's permit, had not told the employer that this was illegal and that she had no green card and, therefore, would have to be let go.
>
> ---
>
> Mr. CORMAN. Madam Chairman, if one does not have a green card, he or she should not be eligible for work. And if a person is not eligible for work, he cannot be available for employment and, therefore, should not be able to draw unemployment compensation.

Congressional Record--House, March 21, 1977, at 8208. The foregoing is self-explanatory and needs no further comment.

This legislative history not only explains that Congress did not intend to allow unemployment benefits to aliens who could not legally work in the United States, but further emphasizes that the test is whether the alien could legally perform the work upon which he bases his claim for benefits and whether he is legally available for work in the United States. The test established by the Court in this case, that is, whether the claimant was in the United States under color of law at the time he filed his claim for benefits, without regard to his eligibility to work, is clearly erroneous in light of the legislative history of 26 U.S.C. Section 3304(a)(14)(A). To the extent that Rubio v. Employment Division, 66 Or. App. 525, 674 P.2d [illegible]

[legal] failed to take into consideration the legal eligibility for work of the alien at the time he performed the services on which he claimed benefits and his legal availability for work at the time he filed his claims for benefits, that decision is contrary to the unambiguous intent of Congress and should not be followed by this Court.

POINT II

THE COURT ERRED IN ITS CONCLUSION THAT THE CLAIMANT WAS ENTITLED TO UNEMPLOYMENT BENEFITS RECEIVED DURING 1981 BECAUSE THE INS WAS AWARE OF HIS PRESENCE AT THE TIME HE FILED FOR THOSE BENEFITS. THE COURT HAS MISSTATED THE LAW AND THE INS WAS NOT AWARE OF THE CLAIMANT'S PRESENCE UNTIL AFTER HE FILED FOR UNEMPLOYMENT BENEFITS.

Assuming arguendo that the Court's slip opinion in this case is correct for purposes of POINTS II and III, the claimant is nevertheless not entitled to unemployment benefits since he was not residing under color of law, even as defined by this Court, when he performed the services on which his benefits were based. Section 5(k)(1) of the Act provides in pertinent part:

> 5. An individual is ineligible for benefits or for purposes of establishing a waiting period:
>
> (k)(1) For any week in which the benefits are based upon services performed by an alien, unless the alien . . . was permanently residing in the United States under color of law at the time the services were performed, . . .

Eligibility under this Section of the Act therefore depends on the existence of two factors: 1) The alien must be permanently residing in the United States "under color of law"; and 2) such residency must exist at the

time the alien performs the services upon which his/her weekly benefit amount is based--the claimant's base year.

The Court's decision that the claimant was residing in the United States "under color of law" was based on its findings that the INS "knew he was in the United States (since he was under docket control), knew where he was living (forms and notices were sent to that address) and took no action to deport him or to act on his application for immigrant status." Slip opinion, at 5. The Court further concluded that the INS "acquiesced" in the claimant's residency by "exercising its discretion not to enforce the law." In the Court's view, therefore, residency "under color of law" was present because the INS: 1) knew of the claimant's residency; and 2) acquiesced therein by failing to deport him.

In reaching this decision the Court announced that the test was whether the claimant was here under color of law, i.e., with INS knowledge and acquiescence, "at the time he applied for unemployment benefits." Slip opinion, at 4.

The Defendant asserts that this test set forth in Antillon is a misstatement of the law and that the conclusion reached thereunder is in error.

A. TO BE ELIGIBLE FOR UNEMPLOYMENT BENEFITS UNDER SECTION 5(k)(1) OF THE ACT, AN ALIEN MUST PERMANENTLY RESIDE IN THE UNITED STATES UNDER COLOR OF LAW AT THE TIME HE PERFORMS THE SERVICES UPON WHICH HIS BENEFITS ARE BASED.

To be found eligible for benefits under Section 5(k)(1) of the Act, an alien must be residing in the United States at the time he performs the

services upon which his weekly benefit amount is based. In this case, however, the Court misstated this subsection of the Act:

> The test in this case is not whether Antillon initially entered this country illegally or whether he was legally entitled to work, but whether he was here under color of law at the time he applied for unemployment benefits. Therefore, the circumstances that govern the outcome of this case are those that were operative at the time Antillon applied for unemployment benefits. . . . [Emphasis added.]

Slip opinion, at 4.

In the present case the claimant filed two separate claims on which benefits were paid; the first on January 5, 1981, and the second on July 15, 1982. The corresponding base years for those claims extend from January 1 to December 31, 1980, and from July 1, 1981 to June 30, 1982. To qualify for benefits on his January 5, 1981 claim, (the July 15, 1982 claim will be discussed in POINT III) the claimant is required under Section 5(k)(1) to have resided in the United States under color of law during the base year--January 1 to December 31, 1980. If he is found to not be so residing, he is ineligible for benefits drawn during 1981.

B. EVEN UNDER THE COURT'S THEORY OF THE LAW, THE CLAIMANT WAS NOT RESIDING IN THE UNITED STATES UNDER COLOR OF LAW PRIOR TO JANUARY 30, 1981.

The claimant states in his brief:

> On January 30, 1981, the Appellant voluntarily went to the Immigration and Naturalization Service (INS) in Salt Lake City to determine his immigrant status in the United States (R. 0033). At that time he was issued an I-94 Arrival and Departure document which indicated that he was in the United States with the knowledge of the INS, and under docket control by the Salt Lake INS office. (R. 0057) [Emphasis added.]

A copy of the I-94 Arrival and Departure document which was issued to the claimant by the Salt Lake INS office on January 30, 1981, and stamped w[illegible] "DOCKET CONTROL SLC" on its face is contained in the record on page [illegible]. In a memorandum submitted to the Board of Review the claimant quoted Section 35-4-5(k) of the Act and commented as follows:

> Claimant makes two statements in light of this statute. First, that he is and was in the United States "under color of law," once he made himself known to the Immigration and Naturalization Service and they did not act to deport him. [Emphasis added]

Furthermore, the Court in its opinion made the following finding of fact:

> On January 30, 1981, not having heard anything concerning his application from the INS, Antillon went to the Salt Lake City INS office to attempt to clear up his status. . . . On the same date, Form I-994 [sic], placing Antillon under docket control of the Salt Lake City INS office was filed. . . . [Emphasis added]

Based on the foregoing it is clear that the INS did not know of the claimant's residency or presence in the United States prior to January 30, 1981, when the claimant voluntarily went to the Salt Lake City INS office. Yet the Court concluded in its decision that "at the time [the claimant] applied for unemployment benefits in 1981 [January 5, 1981] . . . the INS knew he was in the United States (since he was under docket control) . . . The Court's conclusion is obviously in error because the claimant was not placed under docket control until January 30, 1981, 25 days after he filed for unemployment benefits. The only possible basis for the Court's conclusion that INS knew of the claimant's presence in the United States at the time he filed for unemployment benefits on January 5, 1981, would have [illegible] the finding of the Appeals Referee that the claimant filed an application

for permanent residence status with the American consul in Mexico in July, 1980, and that the application was later [presumably before January 5, 1981] transferred to Salt lake City, Utah.

The finding of the Appeals Referee that the record of the claimant's application was transferred to the Salt Lake City INS office is not supported by any direct evidence in the record. In fact, it has support in the record only in a similar finding in the decision of a Department Representative, which refers to testimony given in a prior, unreported hearing. R.0045 However, there is nothing in the finding of either the Department Representative or the Appeal Referee to indicate <u>when</u> such records were transferred to Salt Lake City. More specifically, the record contains no evidence whatsoever to support a conclusion that such records had been transferred to Salt Lake City on or before January 5, 1981. On the contrary, the evidence clearly shows that the Salt Lake City INS office did not know of the claimant's presence in the United States until January 30, 1981. Furthermore, claimant has not contended that the INS knew of his presence prior to January 30, 1981, as set forth herein at page 15. Thus, to the extent the factual conclusion of the court that the INS knew of the claimant's presence in the United States on January 5, 1981, is based on a transfer of records from Mexico to Salt Lake City, that conclusion is in error and is contrary to the argument of the claimant.

The evidence in the record establishes by a "preponderance of the evidence," the stated test under Section 35-4-5(k)(3), that the INS was unaware of the claimant's residence in the United States prior to January 30, 1981.

Thus the claimant did not reside in the United States "under color of law when he performed the services (January 1 to December 30, 1980) on which his January 5, 1981 claim for benefits was based.

POINT III

THE COURT ERRED IN ITS CONCLUSION THAT THE CLAIMANT WAS IN THE UNITED STATES UNDER COLOR OF LAW DURING 1982 DUE TO THE "ACQUIESCENCE" OF THE INS TO THE CLAIMANT'S PRESENCE. FURTHER, THE COURT FAILED TO RESPOND TO DEFENDANT'S ARGUMENT THAT THE KEY CASES OF HOLLEY AND RUBIO, ON WHICH THE COURT RELIED, INVOLVED ACTION BY THE INS TO ALLOW THE INDIVIDUAL TO REMAIN IN THE UNITED STATES, AS CONTRASTED WITH ALLEGED INACTION, ON WHICH THE COURT RESTS ITS CONCLUSION OF ACQUIESCENCE.

This Court held in its decision that where the INS: 1) knows that an alien resides in the United States; and 2) acquiesces therein by not acting to deport him/her, such residency is "under color of law."

> 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.

Slip op., at 5.

Thus, for the claimant to be found eligible under Section 5(k)(1) of the Act, as construed by the Court, the INS must have known of and acquiesced in his residency during the base periods upon which his weekly benefits were based. Point II above discussed reasons the claimant was not residing in the United States under color of law during his first base year, January 1 to December 31, 1980. In this point the Petitioner asserts that the record does not show by a preponderance of the evidence that the claimant resided in the United States with INS knowledge and acquiescence during his second base year.

In its decision this Court based its reasoning on the Second Circuit Court's reasoning in Holley v. Lavine, 553 F. 2d 845 (2d Cir. 1977), and Rubio, supra. However, the Court's reliance on these cases is misplaced because the "acquiescence" of the INS in Holley, Rubio, and other cases relied on, is substantially different from the acquiescence ascribed to the Salt Lake INS office in the present case.

In its original brief the Defendant agreed with the definition of the phrase "under color of law" as defined by the 2nd Circuit Court in Holley and quoted in Plaintiff's brief. The Holley Court stated:

> The phrase obviously includes actions not covered by specific authorization of law. . . . "Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. [Emphasis added.]

The Defendant asserts now, as it did in its Brief at pages 7-8, and to which the Court failed to respond, that in each of the cases construing the phrase "under color of law" the INS had affirmatively acted in allowing the aliens to stay in the United States by the affirmative exercise of discretion not to deport--as evidenced by letters or documents to that effect. Such is not the case here. In this case the INS acted affirmatively, although with the usual administrative delays, in attempting to deport the claimant. Such action is apparent from January 30, 1981, through the end of the claimant's second base year. The INS therefore never acquiesced in his residency.

In the Holley case the New York Department of Social Services was notified "by formal letter" from an "official" of the INS that "'deportation proceedings have not been instituted . . . for humanitarian reasons' and the

'Service does not contemplate enforcing her departure . . . at this time.

The court reasoned further:

> Far from being in a class with millions of aliens unlawfully residing in the United States, plaintiff is in what is almost certainly a miniscule sub-class of aliens who, although unlawfully residing in the United States, are each individually covered by a letter from the Department of Justice stating that the [INS] "does not contemplate enforcing . . . [the alien's] . . . departure from the United States at this time."
>
> This case is thus narrowed to the precise question whether, in the unusual situation where an alien parent has an official assurance that the parent will not be deported at least until the children are no longer dependent on that parent, such parent is "permanently residing in the United States under color of law." [Emphasis added.]

Under the unique facts of that case, i.e., INS knowledge of her residency and its formal assurance that deportation proceedings would not be instituted for humanitarian reasons, the court concluded that the claimant resided in the United States under color of law.

In the case of *Rubio*, *supra*, the claimant's wife filed an application on his behalf for permanent residence in October, 1980. The INS "approved her petition" and on December 22, 1980, notified her that it had forwarded the application to the United States Consulate in Vancouver, British Columbia, for action by the Department of State. At this time the INS also issued claimant a form I-210 which granted him three months to depart voluntarily from the country. This grant was renewed every three months for a total of five times until the claimant received permanent resident status in March, 1982. Based on these facts the Oregon court held:

> His residence was . . . under "color of law" because INS knew of it and, by its routine regular extensions of his voluntary departure, had acquiesced in it. At the least, INS exercised its discretion not to enforce the law; more accurately, it knowingly maintained the status quo pending the outcome of claimant's application for permanent residence. [Emphasis added.]

The granting of regular extensions constituted a deliberate "exercise of discretion" not to enforce the law--clearly an affirmative act.

In Papadopoulos v. Shang, 414 N.Y.S. 2d 152, 67 A.D. 2d 84 (1979), the court found that the INS had "sent a formal letter to the New York State Department of Social Services, informing them that it did not contemplate 'enforcing her departure from the United States at this time' for humanitarian reasons." (Emphasis added.) This acquiescence again took the form of an affirmative act on the part of the INS not to enforce deportation.

The case of St. Francis Hospital v. D'Elia, 422 N.Y.S. 2d 104 (1979), was based on a finding only of failure of INS to deport the claimant. To the extent it is inconsistent with Holley, Rubio, and Papadopoulos, Petitioner urges that it should not be considered controlling or in any way dispositive of the issue. It simply does not fit the pattern of affirmative INS action granting the alien the right to remain in the United States which is found in Holley, Rubio, and Papadopoulos.

Applying the standards set forth in Holley, Rubio, and Papadopoulos to the facts in the case at hand leads to the inescapable conclusion that the INS has not, by affirmative act or exercise of discretion, allowed the claimant to remain in the United States.

The Court in its June 6, 1984 decision found that "[n]o hearing date was ever set, no hearing has yet been held, and no further action has been taken by the INS on Antillon's application for suspension of deportation or on his application for permanent residency." This finding is not supported by substantial evidence in the record.

Since the record contains only evidence dated through April 12, 1983, the date of the Appeals Referee's hearing, the Court's finding can only be based on the statements made by the claimant's attorney, Ms. Espenoza, in claimant's brief and in oral arguments held before this Court in February, 1984. Ms. Espenoza stated: "No action on the collateral immigration proceedings which were initiated by an Order to Show Cause [September 10, 1982] have yet been held. . . ." This statement is not true. However, since Ms. Espenoza did not represent the claimant in the collateral immigration proceeding she may not have been aware of specific action taken by the INS subsequent to September 10, 1982, with regard to the claimant.

Set forth below in chronological order are acts which the Petitioner asserts constitute affirmative acts to deport the claimant and evidence a lack of acquiescence during the claimant's second base year, July 1, 1981, to June 30, 1982, and thereafter:

1. On January 30, 1981, the Salt Lake INS office placed the claimant under "docket control." R. 0057 Claimant was also issued a Form I- printed in Spanish, which instructed in part: "You are required to depart the U.S. not later than March 1, 1981."

2. On September 10, 1982, after the close of the claimant's second base year, the INS issued an Order to Show Cause (R. 0051), "which initiated deportation proceedings (8 C.F.R. Section 242.1)." (Claimant's Brief, p. 3.) This act alone demonstrates that <u>after</u> the close of the claimant's second base year the INS still intended to deport him and had not acquiesced in his residency. The claimant was therefore not residing in the U.S. "under color of law," i.e., with INS knowledge and acquiescence, when the services were performed (second base year).

There is therefore no evidence in the record to support the finding that the INS had acquiesced in the claimant's residency during the base period or thereafter.

3. An affidavit (See Appendix A) has been submitted to the Commission which discloses that on September 23, 1983, the INS scheduled a deportation hearing for October 7, 1983, and explains that the delay was caused by a large backlog of Immigration cases (over 400) to go before the Immigration Judge. The affidavit states as follows:

> On October 7, 1983 Mr. Antillon appeared at a deportation hearing where it was discovered that the numbers 241 were inadvertently left out of the charge. He was given a Form I-261 setting forth the corrected charge but neither he nor his attorney would accept anything less than 7 days notice of change in charge as guaranteed by the Immigration statutes.

Although this affidavit is dehors the record, the Court has previously noted that there may be appropriate exceptions to the general rule prohibiting consideration of such evidence. See <u>Flick</u> v. <u>Van Tassell</u>, Utah, 547 P.2d 204 (1976), wherein the court stated:

> . . . We do not examine things dehors the record, unless on some rare occasions, an obvious injustice will ensue arising out of misunderstanding or fraud, reflecting unconscionability.

The instant case clearly comes within this exception. The Court's finding that no hearing was ever set is based solely on argument of counsel, which was made in February of 1984, over three months after the October 7th date of the INS hearing. The Court's finding is no more than an assumption which it has elevated to the level of a finding of fact on which it then based its decision. For the Court to now allow that finding to stand despite the affidavit of the INS would result in an injustice in the administration of the unemployment insurance program which would be unconscionable.

The record and the INS affidavit clearly establish by a preponderance of evidence an effort to deport the claimant, although delayed by a very heavy caseload and by administrative "red tape." Delayed affirmative action is not the equivalent of inaction or acquiescence. The INS' failure to act within a certain amount of time can only by assumption be construed as a deliberate exercise of discretion to not act. That assumption is simply not supported by the record and is contrary to the evidence available to the Court.

The record and the INS affidavit submitted to this court, establish by a "preponderance of the evidence" that the INS has not acquiesced in the claimant's residency in the United States. The record shows that the INS acted affirmatively and consistently to deport the claimant, albeit [illegible] action was delayed by an overwhelming caseload and calendaring delays. [illegible]

claimant was therefore not residing "under color of law," i.e. with INS knowledge and acquiescence, during the time he performed the services upon which his benefits were based.

CONCLUSION

The Court erred in its conclusion as to the meaning of the phrase "under color of law" as used in Section 35-4-5(k) of the Utah Employment Security Act and 26 U.S.C. Section 3304(a)(14)(A) of the FUTA. The Court's decision further failed to respond to the arguments of Defendant that the denial of unemployment benefits to illegal aliens is based on a congressional intent related to the eligibility of the alien to legally work in the United States. The Court also has misstated the application of the law in holding that an alien need only be in the United States under color of law at the time he files his claim for unemployment benefits, rather than at the time he performs the services on which such benefits are claimed. Finally, the Court erred in its conclusion that the INS acquiesced in the claimant's continuing residence in this country.

The claimant in this case was not present in the United States under color of law at the time he performed services during the base periods for either of his claims in 1981 or 1982. To this day the claimant has offered no evidence that he is legally entitled to work in the United States. Under such circumstances it is the intent of Congress that this claimant and all aliens in his same situation be denied the benefits of the unemployment insurance system.

Cases interpreting the "color of law" provision of unemployment compensation statutes throughout the country are pending decision at this time. To the extent that Rubio v. Employment Division, supra, failed to analyze the legislative history of this provision it only brings confusion to this new area of the law. This court, through its careful analysis of the issue, has the opportunity to set the precedent and provide the pattern by which other states may resolve their illegal alien cases.

The Court should reverse its decision in this matter and affirm the Board of Review of the Industrial Commission of Utah.

Respectfully submitted this 10th day of July, 1984.

DAVID L. WILKINSON
Attorney General

K. ALLAN ZABEL
Special Assistant Attorney General

By ____________________
K. Allan Zabel
Special Assistant Attorney General

____
Bruce A. Horstmanshoff
Attorney for Defendant

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that I mailed two copies of the foregoing Defendant's Brief postage prepaid to: Cecelia M. Espenoza, UTAH LEGAL SERVICES, INC., 637 East Fourth South, Salt Lake City, Utah 84102, this 10th day of July, 1984.

____

AFFIDAVIT

I Richard C. Smith depose and say, I am an officer in the United [States] Immigration Service and have been so employed for approximately 12 years. [I] have been assigned as the Officer in Charge of the Salt Lake City sub office of the Denver District office since October 3, 1983. I am the official custodian of the Immigration Service records of the Salt Lake office. I have caused that a complete review of all records pertaining to Baltazar Antillon-Quezada, DOB 1/19/50, POB Mexico, A23 654 011 be completed.

It disclosed that Mr. Antillons was first in contact with the United States Immigration Service office in Salt Lake City, Utah on January 30, 1981. At that time he presented himself as an alien illegally in the United States. He was processed on Form I-218, Record of Deportable Alien, and was granted a period of 30 days to voluntarily depart the United States. He was given a Form I-210, which stated in spanish in part "you are required to depart the United States not later than March 1, 1981". It further states that he was to contact the Service office with the arrangements he had made to part. There is no record of his having ever advised the Service office of his intended departure. Mr. Antillon was further placed under docket control, under the category illegal alien required to depart prior to hearing. He was granted the 30 day voluntary departure based on statements made by him indicating he was willing and able to depart the United States voluntarily and finally that he had filed a visa application at the American Consulate, [C]d Juraz thru an attorney to grant him immigrant status in the United States.

On July 3, 1984 I caused a check of the records of the American Consulate, Cd Juraz Chi, Mexico be made for the application claimed by Mr. Antillon. No record of any application of any type could be located pertaining to Mr. Antillon. The consulate staff stated there is no record of subject having ever filed any application.

Mr. Antillon was requested to appear at the Service office on August 16, 1982 for removal. He appeared on August 30, 1982 with his attorney of record, Gary Barnett. He requested a Order to Show Cause hearing before an Immigration Judge to contest deportation and he further indicated he would request administrative relief thru an application for suspension of deportation, Sec. 244 of the Act (8USC 1254).

On September 10, 1982 a mail out Order to Show Cause was issued with a hearing date and time to be set.

Subjects hearing was scheduled on September 23, 1983 for October 7, 1983. The delay was caused by a large backlog in Immigration cases (over 400) to go before the Immigration Judge.

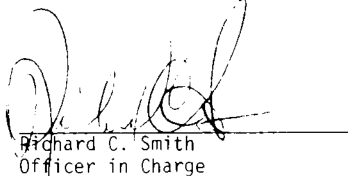
On October 7, 1983 Mr. Antillon appeared at a deportation hearing where it was discovered that the numbers 241 were inadvertently left out of the charge. He was given a Form I-261 setting forth the corrected charge but neither he nor his attorney would accept anything less than [illegible] days notice of change in charge as guaranteed by the Immigration statute

I further depose and say that Cecilia Espinoza has never represented Mr. Antillon before the Immigration Service to my knowledge. Mr. Antillon was to be further scheduled in August, 1984 for his full hearing before the Immigration Judge.

I further depose and say that the action taken against Mr. Antillon has been that taken in all simularly situated aliens, to try and remove them from the United States. He was never advised he could legally stay in the United States and infact was always advised that because of his manner of entry, without inspection, he would have to leave the United States to obtain any visa. All the efforts of the Service to remove him from the United States have been hampered by the extreme backlog in the Immigration Judge's calendar.

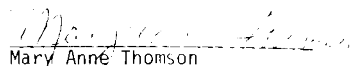
I further depose and say that normal Service and Consular actions are not to forward applications filed at an American Consulate outside the United States to a Service office inside the United States. If a visa application had been filed as claimed and it was approvable, the consulate would have issued a visa without any correspondence with a Service office. The fact that the beneficiary alien was making the application outside of the United States is prima facie evidence that he was not in the United States.

I swear under oath that the above affidavit is true and correct to the best of my knowledge so help me God. Sworn to this 6th day of July, 1984 at Salt Lake City, Utah.



Richard C. Smith
Officer in Charge

I, Mary Anne Thomson, Deputy Clerk, United States District Court in and for the United States Judicial District of Utah certify that this is a true and correct signature.



Mary Anne Thomson