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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

MILTON G. KIMPSON, JUDGE
SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Docket No. 18-ALJ-17-0198-CC
Appellate Case No: 2019-001800

Habibunnisa Begum ……Respondent

v.

Florence County Tax Assessor …..……. Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 21, 2016 the respondent purchased a home in Florence County in which she resides with her family. The respondent is employed by the Marion County School District and is in the United States under the Immigration and Nationality Act ("INA") as a nonimmigrant worker visa status commonly called H-1B. On March 7, 2017 the Respondent applied to the Appellant for the four percent (4%) special assessment on real property. The Respondent was asked to present evidence that the property was her legal residence and that she had been domiciled at that address during the applicable tax year.

She was interviewed by the Florence County Tax Assessor and asked to provide information concerning her status in the United States. She provided an IMS Form I-797B which indicated that she was legally present in the United States as a nonimmigrant pursuant to an H-1B work visa, a temporary visa.

The Respondent has been living and working in South Carolina since 2005.

The Appellant having viewed the Respondent's submissions, denied the Respondent's request for the four percent (4%) special assessment. The exemption from taxation the Respondent sought was denied because she failed to meet the residency and domiciliary requirement of S.C. Code Ann. §12-43-220 (c)(2)(i). The Respondent appealed this denial to the Florence County Board of Assessment Appeals. This Board upheld the denial.

The Respondent then appealed the denial of her request to the South Carolina Administrative Law Court. A hearing was held on February 20, 2019. The Order of the Administrative Law Court was rendered on October 2, 2019. This Appeal followed.

STANDARD OF REVIEW

In an appeal from an Administrative Law Court decision, the Administrative Procedures Act establishes the standard of review, S.C. Code Ann. §1-23-610 (B). If this Court determines that the Administrative Law Court's decision was supported by substantial evidence, the Court need only find, looking at the entire record, evidence which reasonable minds could reach the same conclusion as the Administrative Law Court. *Hill v. SC Department of Health and Environmental Control*, 389 S.C. 1, 9 – 10, 698 S.E. 2d, 612, 617 (2010). But in the event the decision of the Administrative Law Court is in violation of a statutory provision or it is affected by an error of law, this Court may reverse the decision of the Administrative Law Court. *Alltell Commc'ns, Inc. v. SC Dep't of Revenue*, 399 S.C. 313, 316 731 S.E. 2d 869, 870 – 871 (2012).

FACTUAL BACKGROUND

The Respondent is in the United States on a temporary work visa (R. p. 61 LL12-15). The only IMS document placed in evidence by the Respondent was the I-797B, Notice of Action (R. p. 110-111). This document recognizes the Respondent's status in the United States as that of a nonimmigrant worker, class H-1B.

The Respondent contends that she is seeking a permanent residency status known as a Green Card and that she has filed an INS Form I-140. She was requested by the Florence County Tax Assessor to provide all IMS documents and the only document she provided was the I-797B. (R. p. 81 LL 20 – R. p. 82 L 11; R. p. 110 - 111).

ARGUMENTS

I. DID THE ADMINISTRATIVE LAW COURT ERR IN CONCLUDING THE RESPONDENT QUALIFIED FOR THE FOUR PERCENT (4%) SPECIAL ASSESSMENT PURSUANT TO THE S.C. CODE ANN. §12-43-220 (C)(2)(I) AND (II)?

The Administrative Law Court went to great links to analyze the Immigration Nationality Act ("INA"). The Respondent contends she is seeking permanent residency status though she is presently in the United States through a nonimmigrant worker visa or status commonly called H-1B. To become a permanent resident, the Respondent's employer obtains a labor certificate from the Department of Labor certifying that there are insufficient able, willing and qualified workers to fulfill the job for the Respondent and that hiring her would not adversely affect the wages or working conditions of those similarly employed. U.S.C.A. §1153 (B)(3)(C) and §1182 (a)(5)(A)(i). Next, the employer must approve an immigrant visa petition that assigns the Respondent one of the INA's immigrant visa preference categories for employment- based permanent residency. 8 U.S.C.A. Sections 1154(a)(1)(F), 1255(a)(2). This petition is called an I-140 (R. p. 61 LL 16 – p. 62 L 18)

Though the Respondent disputes that she was asked for the I-140 form by the Florence County Tax Assessor (R. p. 62 LL19 – p. 63 L. 2), the Florence County Tax Assessor testified he did. (R. p. 81 LL 20 - R. p. 82 L11). The burden is on the Respondent to provide all information of her legal status in the United States. S. C. Code Ann. §12-43-220(c)(2)(iv).

A visa is not received upon approval of the Respondent's employer I-140 petition because there is a quota where only a certain number of visas are made available per country of

origin each calendar quarter, 8 U.S.C.A. §1151 (a) (2), 1152 (a). The I-140 Petition makes the Respondent eligible to receive a visa once one becomes available.

Finally, the Respondent must apply for an adjustment of status to become a permanent resident, 8 U.S.C.A. §1255 (a). This application is called an I-485 Petition. This is an application to register permanent residence or adjust status 8 C.F.R. §204.5 (n)(1). The I-485 application cannot be filed until the visa is immediately available 8 U.S.C.1255 (a)(3); 8 C.F.R. § 245.2 (a)(2).

The only evidence from the INS before the Administrative Law Court was the I-797B. None of the other forms that are required for the change in status for the Respondent were supplied to the Appellant or introduced into evidence at the hearing before the Administrative Law Court.

The evidence before the court shows that the Respondent must renew her H-1B visa periodically to remain in the United States. The Respondent testified that she, at least on one occasion, had to leave the United States and return to India to renew her passport. (R. p. 65 LL 6-R p. 66 L 10). She has to return to India for that country to grant her a new Indian Passport (R. p. 65 LL 6 – R. p. 66 L 10). Since she is under the jurisdiction of India, she is currently a resident of India.

The Respondent is present in the United States on a temporary visa. SC Code Ann. §12-43-220 provides that for an individual to qualify for the four percent (4%) special assessment the following has to be met:

> "The owner occupant must have actually owned and occupied the residence as his legal residence and been domiciled at the address for some period during the applicable tax year. A residence which has been qualified for a legal residence for any part of the year is entitled to the four percent (4%) assessment ratio provided in this item for the

> entire year, for the exemption for property taxes leveed for school operations pursuant to §12-37-251 for the entire year, and for the homestead exemption under §12-37-250, if otherwise eligible, for the entire year. SC Code Ann. §12-43-220 (c)(2)(i) in addition the Respondent, to qualify for the four percent (4%) special assessment must certify the following:
>
> (a) The residence which is the subject of this application is my legal residence and where I am domiciled at the time of this application and that neither I, nor any member of my household, claim to be a legal residence of a jurisdiction other than South Carolina for any purpose; and
>
> (b) that neither I, nor a member of our household, claimed the special ratio allowed by this section on another residence. SC Code Ann §12-43-220 (c)(2)(ii)."

It is undisputed that the respondent owns the property in which she is claiming the four percent (4%) special assessment and that she lived on the property during the applicable tax year. The dispute in this case is whether or not the Respondent is a legal resident of a jurisdiction other than South Carolina for any purpose.

Her home country had to authorize an Indian passport for her to return to the United States. Without that permission from her country, India, she would have been unable to return.

In *Ravenel vs. Dekle*, 265 SC 364, 218 S.E.2d 521 (S.C.1975) the South Carolina Supreme Court addressed the meaning of the term domicile. The court citing, *Gasque v. Gasque*, 246 SC 423, 143 S.E. 2d 811 (1965), held "The term domicile means the place where a person has his true, fixed and permanent home and principle establishment, to which he has, whenever he is absent an intention of returning. The Court in *Ravenel* stated "…intent is the most important element in determining the domicile of any individual. It is also elementary, however, that any expressed intent on the part of a person must be evaluated in the light of his conduct which is either consistent or inconsistent with such expressed intent." Id. 528. For intent to be operative, there must be an ability to exercise intent. Having a nonimmigrant temporary status precludes the realization of intent to have a permanent residence in Florence County. Though

the Respondent has expressed her intent that her property in Florence County is her residence, she does not have the legal status to realize her desire. She is subject to being removed from South Carolina by either the United States or her home country of India. (R. p. 66 LL 24 – R. p. 67 L 5) Though the Administrative Law Court found that the Respondent testified that she was not required to return to India, the Respondent was required to return to India to renew her passport. This was required so that she could remain in the United States. (R. p. 65 LL 6- R. p. 66 L 10).

Legal residence as defined in S.C. Code Ann. §12-43-220 is a tax exemption statue. Tax Exemption statues are strictly construed against the taxpayer *CFRE, LLC v. Greenville City Assessor* 395 SC 67, 716 S.E. 2nd 877 (2011), *TNS Mills v. SCDOR*, 331 SC 611, 618, 503 S.C. 2nd 471, 475 (1998) The Respondent is not hired on a permanent basis. She is engaged annually by the Marion County School District (Petitioner's Exhibit 7). This contract is contingent on the Respondent maintaining her teaching certificate as well as federal funding for her position. It is also a contract of employment for one year, the 2018-2019 school year. The H-1B status of the Respondent does not give her the status of an immigrant. She is in the United States on a temporary basis with temporary employment. Her H-1B visa clearly states that she is not a resident of any state, much less Florence County.

For these reasons, the decision of the Administrative Law Court should be reversed.

II. DID THE COURT ERR IN HOLDING THE STATUS OF THE RESPONDENT UNDER THE IMMIGRATION NATURALIZATION ACT (INA) WAS OTHER THAN THAT OF A NON-IMMIGRANT WORKER VISA (COMMONLY CALLED H-1B)?

The H-1B Visa program allows aliens to enter the United States on a temporary basis to perform certain specialty occupations including teaching 8 U.S.C.A. §1101(a)(15)(H)(i)(b). The legal status of an alien in the United States on an H-1B visa is that of a non-immigrant. This visa allows an individual to temporarily come to the United States to perform work. The statute simply provides than an alien may come "temporarily" into the United States to perform work. Pursuant to her contract with the Marion School District, the Respondent is not hired on a permanent basis, but year-to-year (Exhibit 7). The only official evidence in the record is the Respondent's H-1B visa. This visa is the only documentary evidence that establishes the Respondent's legal status in the United States. The Respondent placed into evidence a form I-797B. (R. p. 110 – 111) This document indicates an intent to adjust her legal status in the United States. However, this document also requires the Respondent to submit a form I-485 which is the application to become a permanent legal resident of the United States. The Administrative Law Court is required to rely on the evidence submitted to it. The fact that no I-485 was entered into evidence or an I-140 Petition leaves the only conclusion that the Respondent's legal status in the United States is that of a non-immigrant temporarily in the United States on an H-1B work visa. The Respondent produced no evidence that she has filed an I-140 Petition.

Even if it is assumed that she had filed an I-140 petition, this is not evidence that she received the legal status of a legal permanent resident. The I-140 petition does not indicate that legal permanent residency has been obtained. There is a quota where only a certain number of visas are made available per country of origin each calendar quarter. 8 U.S.C. §1151 (a) (2), 1152 (a). As mentioned earlier, the Respondent would have to file an I-485 petition for her permanent legal residency. 8 U.S.C. §12-55 (a).

The Respondent is temporarily in the United States by all the evidence. During the tax year 2017 she did not have the legal right to reside permanently in the United States or in South Carolina. As such, she could not legally secure the intent to make her permanent place of residence in Florence County, South Carolina.

In *Guarrerov v. McNair*, 157 So. 2nd 79, the Florida Supreme Court held that a citizen and former resident of a foreign country, who is in the United States solely on the authority of a temporary visa, "has no assurance that he can continue to reside in good faith for any fixed period of time in this country…[and, therefore] does not have the legal ability to determine for himself his future status and does not have the ability legally to convert a temporary residence into a permanent home." *Id* at 81.

Similarly, in *DeQuervain v. Desguin*, 927 So. 2d 232 (Fla. 2d – DCA 2006), the Court found that homeowners who held only temporary visas "could not form the requisite intent to become permanent residents for purposes of the tax emption". *Id* at 233.

Legal residence as set forth in S.C. Code Ann. §12-43-220 (c) is a tax emption statute which provides relief from ad valorem taxes. This statute must be construed

strictly against the Respondent, *CFRE, LLC v. Greenville City Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011).

The Administrative Law Court on February 12th, 2019 tried *Godhrawala v. Barnwell County Tax Assessor*, Docket number 18-ALJ-17-0395-CC under facts identical with the facts of this case. The Court concluded that an individual whose "Current status in this country is only temporary, ..cannot evidence the requisite intent to remain in South Carolina permanently to meet the 'legal resident' and 'domicile' 'requirement of §12-43-220 (c)(2)(i). The Court held that the property did not qualify for the four percent (4%) Special Assessment. The Administrative Law Court in a decision issued on October 9, 2018 in the case of *Richland County Assessor v. Herrera*, Docket number 18-ALJ-17-0006-CC found where there was no immigration status, the tax payer could not perform the requisite intent to make property in South Carolina her domicile for purposes of the four percent (4%) special assessment. Similarly, in this case the Respondent has no definitive immigration status and is here purely as a nonimmigrant temporary worker.

Accordingly, the Administrative Law Court's decision approving the application of the Respondent for the four percent (4%) Special Assessment should be reversed.

III. DID THE ADMINISTRATIVE LAW COURT ERR IN FAILING TO GIVE DEFERENCE TO THE ADMINISTRATIVE INTERPRETATION OF S. C. CODE ANN. §12-43-220?

The Appellant consults with the South Carolina Department of Revenue regularly concerning tax issues. The Appellant, in regards to the administration of ad valorem taxes, operates under the guidance of the South Carolina Department of Revenue. The Appellant received correspondence from the South Carolina Department of Revenue opining that the Respondent did not qualify for the four percent 4% special assessment (Respondent's Exhibit 1). The Administrative Law Court failed to give deference to the South Carolina Department of Revenue's interpretation and application of S.C. Code Ann. §12-43-220. "When an agency charged with administering a statue or regulation has interpreted the statue or regulation, courts, including the Administrative Law Court, would defer to the agency's interpretation absent compelling reasons. 'We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statue'" *Kiawah Devp. Partners, II v. SC Department of Health and Environmental Control*, 411 S.C. 16 at 34-35, 766 S.C. 2nd 707 at 718 (S.C. 2014). The South Carolina Department of Revenue opined in Respondent's Exhibit 1 and Court's Exhibit 1 that the Respondent, or one similarly situated, did not qualify for the four percent 4% special assessment. The South Carolina Department of Revenue oversees the administration of ad valorem taxes by the various counties of this state.

The Administrative Law Court misconstrued its role in reviewing the directions of the South Carolina Department of Revenue. South Carolina Courts have long recognized that considerable weight should be accorded to the executive branch's construction of a statutory scheme which it over sees.

The South Carolina Department of Revenue's interpretation of S.C. Code Ann. §12-43-220 is neither arbitrary, capricious nor manifestly contrary to the statute. The South Carolina Department of Revenue's interpretation is reasonable and consistent with its regulation of the tax laws of the State of South Carolina.

The Administrative Law Court's decision rejects the South Carolina Department of Revenue's interpretation of S.C. Code Ann. §12-43-220. In examining the South Carolina Department of Revenue's interpretation of S.C. Code Ann. §12-43-220, the first issue is to determine if the statute directly speaks to the issue presented in this case. The referenced code section does not address an alien's legal status in the United States. As such, the next analysis is whether or not the South Carolina Department of Revenue's position is based on a permissible construction of the statute. If the Agency's opinion is without an arbitrary or a capricious interpretation, then the Agency's opinion should be given controlling weight. In other words, the Administrative Law Court may not substitute its own construction of the statute for a reasonable interpretation provided by the South Carolina Department of Revenue. The Appellate Court in this state has recognized that considerable weight should be accorded to an agency's construction of statute that the agency administers. *Kiawah Devp. Partners, II v. SC Department of Health and Environmental Control*, 411 S.C. 16, 34 766 S.E. 2d 707 (S.C. 2014).

Applying the principle of deference to administrative interpretations, the Administrative Law Court's decision should be reversed.

CONCLUSION

The Administrative Law Court erred as a matter of law in finding that the Respondent established residency pursuant to §12-43-220. By all the evidence before the Administrative Law Court, the Respondent is temporarily in the United States. She does not have the legal right to reside permanently in the State of South Carolina. As such, the Respondent could not legally secure the intent to make real property in Florence County her permanent place of residence. It is respectfully submitted that the decision of the Administrative Law Court be reversed.

s/D. Malloy McEachin, Jr.
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