

MINNESOTA LAWYER

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Court clears way for visa

Reverses homeland security denial

The 8th U.S. Circuit Court of Appeals has reversed a District Court judge's decision upholding revocation of an alien employment certification by the Department of Homeland Security.

The case will return to the DHS, where the alien employee will be able to apply for an immigrant visa.

In an opinion written by Judge Kermit Bye, Sugule et al. v. Frazier, et al., the court said the DHS's actions were arbitrary and capricious and its findings not supported by substantial evidence. It further said that U.S. District Court Judge John Tunheim erred in granting summary judgment to the government when the employee appealed the DHS decision to the District Court.

"The DHS's logic suffers from several flaws. Its reasons are conclusory, frequently boiling down to the mere 'because I said so' explanation. To the extent the DHS identified specific issues with [the employee's] evidence, all of them are vulnerable to serious criticisms," Bye wrote.

The employee's attorney, Dyan Williams of Minneapolis, said the case is notable because "immigration law is tough and the 8th Circuit is one of the tougher circuits if you're representing foreign nationals. But this case is strong on the facts and strong on the law."

Edina immigration attorney Robert Webber said that questionable determinations by DHS are not unusual because the department looks for any inconsistencies and doesn't weigh evidence. Similar cases involving employers who want to bring in employees don't get pushed to the circuit courts because the employers don't want to invest the money and time.

"I credit the employer and the lawyer for pushing this case," he said.

Clerical error

The worker in this case, Abdulaziz Sugule, is a Canadian citizen employed by the Minneapolis accounting firm AMS & Associates, Inc. AMS said that it needed Sugule because he is an ethnic Somali who could serve the company's Somali clientele. The Department of Labor certified the application, which essentially said that the employment of the alien would not adversely affect similar U.S. workers. This meant the company could apply for an immigrant visa on Sugule's behalf. Sugule also filed the paperwork necessary to obtain green cards for himself and his family.

After four years of waiting, the DHS approved a Form I-140 Immigrant Visa Petition for Alien Worker but revoked it three weeks later. The DHS found three documents that it said showed that Sugule owned AMS and had committed fraud on the DOL.

The documents included a uniform residential contract application with "self-employed" checked on it, a surety bond application and a financial statement saying that Sugule was the owner of AMS.

Sugule said a mistake was made on the uniform residential contract by a bank employee and the other two documents were a "desperate and foolish attempt to show [he] had a strong financial background," the court wrote.

Sugule submitted 18 items of evidence, including AMS's tax returns, the owners' individual tax returns, AMS's certificate of assumed name and other corporate documents, stock certificates, and a letter saying that the uniform

residential contract contained a clerical error.

But the DHS revoked the labor certification and the District Court granted summary judgment to the government, saying that it had not acted arbitrarily and capriciously.

The 8th Circuit disagreed. It said that the DHS relied on its finding that Sugule was the owner of AMS and had defrauded the DOL. But the record does not support that finding, the court said.

"The DHS erred in imputing the entire ownership of AMS to Sugule, thereby disregarding the copious evidence that Sugule did not hold any AMS stock and the absence of any objective evidence to the contrary. The DHS also failed at explaining away the overwhelming evidence negating its position," the court said.

The DHS professed to give preference to the quality of the evidence over the quantity, and intimated the Sugule's evidence was "self-serving" and "self-prepared," the court said.

"[H] owever, it did not hesitate to hang its own hat on Sugule's equally self-serving and self-prepared representations in the bond application, the personal financial statement, and the residential contract application. In the same vein, while the DHS found the same three documents to be credible by virtue of having been signed under the threat of perjury, it readily disregarded sworn affidavits from AMS's three owners and a letter from AMS's counsel without any explanation," Bye wrote.

The court also chided the DHS for refusing to accept a stock certificate without an accompanying stock ledger, and said that the DHS was factually incorrect and disingenuous in rejecting tax and incorporation records.

"Because each of the agency explanations is deficient on some level, as is the agency's own evidence, the DHS's decision failed to take the whole record into account and is not supported by substantial evidence," the court concluded.

Representing the government, Assistant U.S. Attorney David Fuller said there were still "decisions to be made" on the case and thus he could not comment.