

Where the USCIS denied the claimant's employment authorization application and did not extend his former work authorization while he appealed that ruling, he was not legally permitted to work. Therefore, he was not available for work under G.L. c. 151A, § 24(b), and is ineligible for benefits. *Affirmed by the District Court*

**Board of Review
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Issue ID: 0037 3845 51

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with an effective date of March 22, 2020. On September 26, 2020, the DUA issued a Notice of Disqualification, providing that the claimant was not entitled to benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 18, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not establish that he was legally authorized to work in the United States and, thus, was not entitled to benefits under G.L. c. 151A, § 24(b). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's authorization to work. The claimant participated in the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the review examiner's decision, which concluded that the claimant did not establish he was legally available for work under G.L. c. 151A, § 24(b), is supported by substantial and credible evidence and is free from error of law, where the claimant had appeals of his employment authorization and permanent resident application denials pending with the Board of Immigration Appeals during his benefit year.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant's name is [Claimant]. He was born in the Dominican Republic on August 7, 1960.

2. In 1990, the claimant moved to the United States without a visa.
3. The claimant married a United States citizen, [Spouse A], on June 29, 1992. In 1992, she filed an I-130 - Visa Petition for Spouse on the claimant's behalf. In 1993, the claimant left the United States for his visa interview at the American Consulate in the Dominican Republic.
4. The claimant obtained conditional residence status on April 15, 1993.
5. On December 1, 1995, the claimant returned to the United States as a conditional resident because he obtained his visa less than two years after he was married. Immigration law required that the claimant petition the USCIS 90 days before the expiration of the two-year conditional resident status to remove the conditions of his residence.
6. On March 8, 1995, the claimant filed an I-751 – Application to Remove Conditional Resident Status.
7. The claimant did not show up for his Conditional Resident Status interview and was placed in removal proceedings on September 27, 1996.
8. On July 30, 1997, the removal proceedings were terminated because there was no proof of service. The claimant remained in the United States in conditional permanent resident status.
9. The claimant divorced [Spouse A].
10. The claimant married [Spouse B], also a United States citizen.
11. On March 9, 2016, the claimant's wife filed an I-130 – Petition for Alien Relative on the claimant's behalf. The claimant also applied for and was granted work authorization effective July 26, 2016, to July 24, 2017. (Claimant Exhibit 6)
12. The claimant also filed an I-485, Application to Register Permanent Residence or Adjust Status.
13. On October 24, 2016, the USCIS approved the I-130 petition brought by the claimant's wife on his behalf.
14. Also, on October 24, 2016, the USCIS denied the claimant's adjustment of status request because his conditional status was never revoked. Instead, the USCIS advised the claimant to file to remove his conditional residential status.
15. On March 14, 2017, the claimant filed an I-751 – Petition to Remove Conditions on Residence.

16. The claimant's employment authorization was also extended for one year.
17. On April 5, 2018, the claimant appeared for a hearing on his I-751 Petition.
18. On July 23, 2018, the claimant applied for his I-765 – Application for Employment Authorization. The claimant was granted employment authorization effective December 10, 2018, through December 9, 2019.
19. On August 26, 2019, the USCIS revoked the I-130 – Petition for an Alien Relative filed by [Spouse B] due to concerns the claimant entered into his marriage to evade immigration laws.
20. On September 25, 2019, [Spouse B] appealed the denial of the I-130 on the claimant's behalf to the Board of Immigration Appeals.
21. On October 3, 2019, the claimant filed another I-765 – Application for Employment Authorization.
22. On March 19, 2020, the USCIS denied the claimant's employment authorization because his I-485, Application to Register Permanent Residence or Adjust Status, was denied.
23. The claimant applied for unemployment benefits and was determined to have a benefit year beginning March 22, 2020.
24. On July 16, 2020, the claimant appealed the decision of the USCIS denying the I-485 application to the Board of Immigration Appeals.
25. On August 11, 2021, the DUA sent the claimant a Notice of Disqualification denying him benefits under Section 24(b) of the Law for the period beginning March 22, 2020, and indefinitely thereafter. The claimant's appeal to the Department of Unemployment is from this Notice.
26. On September 8, 2021, the Board of Immigration Appeals dismissed the claimant's appeal, denying the I-130 application.
27. The Board of Immigration Appeals has not yet made a determination on the claimant's I-751 application.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 7, which states that the claimant did not show up for his conditional resident status interview, as Remand Exhibit # 25 (USCIS

Decision, August 26, 2019) states that the claimant attended the interview related to his Form I-751, Petition to Remove Conditions on Residence. We also reject the portion of Consolidated Finding # 24, which states that the claimant appealed the denial of the Form I-485 on July 16, 2020, as Remand Exhibit # 26 (Claimant's "Supplement to Answers" of remand questions) indicates that the appeal was filed on a date prior to July 16th, and the USCIS forwarded the appeal to the Board of Immigration Appeals on July 14, 2020. We further reject the portion of Consolidated Finding # 25, which states that the DUA's Notice of Disqualification was issued on August 11, 2021, as Exhibit # 3, the Notice of Disqualification, is dated September 26, 2020.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

The review examiner initially denied the claimant benefits pursuant to G.L. c. 151A, § 24(b), which provides, in pertinent part, as follows:

[An individual, in order to be eligible for benefits under this chapter, shall] . . . (b) Be capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted

As a state agency administering the unemployment insurance programs, we must also abide by U.S. Department of Labor (DOL) regulations governing eligibility for unemployment insurance. These regulations require that a non-citizen must be legally authorized to work by the appropriate U.S. agency in order to be considered "available for work." Specifically, 20 C.F.R. § 604.5 — Application — availability for work, provides, in relevant part, as follows:

(f) Alien status. To be considered available for work in the United States for a week, the alien must be legally authorized to work that week in the United States by the appropriate agency of the United States government. In determining whether an alien is legally authorized to work in the United States, the State must follow the requirements of section 1137(d) of the SSA (42 U.S.C. 1320b-7(d)), which relate to verification of and determination of an alien's status.

Thus, in order to find the claimant available for work under G.L. c. 151A, § 24(b), the claimant must show that, during his benefit year, he was legally authorized to work by the appropriate U.S. agency, currently the U.S. Department of Homeland Security (DHS) U.S. Citizenship and Immigration Services (USCIS).

The review examiner originally concluded that the claimant did not have authorization to work in the United States during the benefit year of his claim, the period of March 22, 2020, through March 20, 2021. *See* Consolidated Finding # 23. The claimant submitted his most recent employment authorization document (EAD), which expired on December 9, 2019, as evidence. *See* Consolidated Finding # 18. The claimant also submitted documentation showing that he timely applied for renewal of his employment authorization on October 3, 2019, but that application was denied by the USCIS on March 19, 2020, because his eligibility for employment authorization was

¹ While not explicitly incorporated into the review examiner's findings, these exhibits are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

based on an Application to Register Permanent Residence or Adjust Status, which was previously denied by the USCIS on January 23, 2020. *See Consolidated Findings ## 21–22 and Remand Exhibit # 22 (USCIS Decision, March 19, 2020).*

As of the remand hearing date, the claimant's appeal to the Board of Immigration Appeals (BIA) on the above two denials was still pending. *See Remand Exhibit # 26 (Claimant's "Supplement to Answers" of remand questions).* However, the claimant's appeal of an August 26, 2019, decision by the USCIS revoking an approved visa petition for the claimant, was dismissed by the BIA on September 8, 2021. *See Consolidated Findings ## 19–20 and 26.* The claimant's failure to present an EAD that was valid during the claimant's benefit year and the denial of the claimant's permanent resident application formed the basis of the review examiner's conclusion that the claimant did not have work authorization during the relevant period.

Because the claimant's most recent EAD at the time he filed his 2020 claim expired on December 9, 2019, we consider the claimant's immigration status during the benefit year of his claim, and whether that status granted him legal authorization to work. The claimant does not dispute that, on August 26, 2019, the USCIS revoked a previously approved visa petition, or that, on January 23, 2020, his Application to Register for Permanent Residence or Adjust Status was denied, and his work authorization renewal application was subsequently denied on March 19, 2020, three days before his benefit year began on March 22, 2020. However, the claimant contends that he was legally authorized to work while his appeals on the above USCIS decisions were pending with the BIA and until there was a final decision. In essence, the entirety of his benefit year. We disagree with the claimant's argument.

The claimant here was not authorized to work incident to his immigration status. *See 8 C.F.R. § 274a.12(a).* Thus, the claimant was required to apply for employment authorization. As stated in the March 19, 2020, USCIS decision denying his employment authorization application (Remand Exhibit # 22), the claimant applied for work authorization under 8 C.F.R. § 274a.12(c)(9), based on his filing of an application for adjustment of status to lawful permanent resident. Provided in 8 C.F.R. § 274a.12(c), in relevant part, is that the "USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which *may* include any period when an administrative appeal or judicial review of an application or petition is pending" (emphasis added).

Here, the USCIS expressly denied work authorization to the claimant on March 19, 2020, and the claimant has not provided any documentation showing that his work authorization was subsequently reinstated by the USCIS at any point during his benefit year, while his appeals were pending with the BIA. *See Kaddoura v. Gonzales*, No. C06-1402, 2007 WL 1521218, at 5 (W.D. Wash. May 21, 2007) (rejecting the plaintiff's argument that, "he is eligible for employment authorization from the time his adjustment of status application is properly filed, extending thereafter, until all administrative and judicial appeals have been exhausted, [as] his eligibility for an EAD resides within the *discretion* of USCIS and there is no appeal from the denial of the application."); *Kondapally v. U.S. Citizen and Immigration Service*, No. 20-920, 2020 WL 5061735, at 5 (Aug. 27, 2020) ("[Deciding] whether to extend the EAD period to encompass the pendency of any review [is] committed to the USCIS's discretion and outside the purview of judicial review.").

In light of the above, we are satisfied that the claimant has not established authorization to work in the United States during the benefit year of his 2020 claim, the period of March 22, 2020, through March 20, 2021.

We, therefore, conclude as a matter of law that the claimant has not satisfied the availability requirement of G.L. c. 151A, § 24(b).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning March 22, 2020, and indefinitely thereafter, until he meets the requirements of G.L. c. 151A, § 24(b).

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 18, 2024



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SVL/rh