

The claimant, who held a TN visa, presented an unexpired passport and Form I-94A to show that she was authorized to work during the benefit year. She may not be disqualified pursuant to G.L. c. 151A, § 24(b).

**Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0072 3695 84

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 reverse.

The claimant filed a claim for unemployment benefits with an effective date of August 22, 2021. On December 22, 2021, the agency denied 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 determination and denied benefits in a decision rendered on July 30, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not establish that she was legally available to work in the United States and, thus, was not entitled to benefits under G.L. c. 151A, § 24(b). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue on appeal is whether the review examiner's decision, which concluded that the claimant did not establish that she 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 documentary evidence in the record shows that the claimant is authorized to work in the United States.

Findings of Fact

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

1. The claimant is not a United States citizen.
2. The claimant is a Canadian citizen.
3. Prior to 2017, the claimant was living in Canada.
4. In 2017, the claimant started living in the United States. The claimant was initially living in [City A], Massachusetts.

5. The claimant does not have residency status in the United States. The claimant does not have an Employment Authorization Card from the United States.
6. The claimant has a United States Social Security card.
7. The claimant applied and obtained a TN Visa from the United States to work for a specific employer located in [City A], Massachusetts. The TN Visa's expiration date to work for this specific employer was January 28, 2023.
8. On February 3, 2020, the claimant started working for the employer in [City A], Massachusetts while also living in Massachusetts.
9. The claimant began working remotely from home in [City A], Massachusetts for the employer also located in [City A], Massachusetts.
10. In July, 2021, the claimant relocated back to Canada and was working remotely in Canada for the employer located in [City A], Massachusetts. The claimant relocated to Canada effective July 29, 2021.
11. The claimant's last date of working remotely for the employer located in [City A], Massachusetts was on August 15, 2021. The employer discharged the claimant for a lack of work.
12. The claimant filed an initial unemployment claim effective the week beginning August 22, 2021.
13. The last week the claimant requested for unemployment benefits (as of the date of the hearing) was the week ending October 9, 2021.
14. On December 22, 2021, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Section 24(b) of the Law from the week beginning August 22, 2021, through the week ending October 9, 2021.
15. The claimant relocated back to the United States effective October 3, 2021, and lived in Michigan until January of 2022. The claimant started working for a different employer during this time and applied for and was granted another TN Visa to work for this employer.
16. Effective January 1, 2022, to present time, the claimant has been living in Tennessee.

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 findings are supported by substantial and credible

evidence; and (2) whether the review examiner’s conclusion is free from error of law. Upon such review, the Board adopts the review examiner’s findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant is not legally available to work in the United States during the relevant period.

The review examiner initially denied benefits after concluding the claimant had not established that she was legally available for work in the United States. In reaching this conclusion, the review examiner applied the state law provision under 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 her benefit year, she 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). Here, the claimant seeks unemployment benefits under a claim effective August 22, 2021. She must show that she was authorized to work during her benefit year, beginning August 22, 2021.

The claimant is a Canadian citizen with a TN visa. *See* Findings of Fact ## 2 and 7. TN is a non-immigrant status, which allows professionals from Canada and Mexico to work in the United States on a temporary basis pursuant to the North American Free Trade Agreement (NAFTA). *See* 8 C.F.R. § 214.6.¹ The DHS regulations at 20 C.F.R. § 274a.2 – Verification of identity and employment authorization, provide, in relevant part, as follows:

(b)(v)(A) The following documents . . . are acceptable to evidence . . . employment authorization: . . .

¹ *See also* uscis.gov/working-in-the-united-states/temporary-workers/tn-nafta-professionals (Apr. 6, 2021).

(5) In the case of an individual who is employment-authorized incident to status or parole with a specific employer, a foreign passport with an Arrival/Departure Record, . . . Form I-94A . . . bearing the same name as the passport and containing an endorsement by DHS indicating such employment-authorized status or parole, as long as the period of endorsement has not yet expired and the employment is not in conflict with the individual’s employment-authorized status or parole

The claimant has presented her Canadian passport and her Form I-94A. *See Exhibits ## 2 (passport) and 3 (Form I-94A).* The name on the Form I-94A matches the name on the passport. Further, the Form I-94A confirms her TN visa status (endorsement by DHS) and shows that the claimant is lawfully admitted into the United States until January 28, 2023. *See Exhibit # 3 (Form I-94A).*² The claimant’s TN visa was valid beginning on January 30, 2020. *See Findings of Fact ## 7 and 8 and Exhibit # 3 (Form I-94A).* This evidence satisfies the requirements under 20 C.F.R. § 274a.2(b)(v)(A)(5) to show that the claimant has been authorized to work in the United States during her benefit year.

However, because the review examiner specifically concluded that the claimant’s layoff on August 15, 2021, by the employer for which she was initially granted the TN visa, rendered her unavailable for work, we will address the matter of the claimant’s availability in further detail. The DHS regulation at 8 C.F.R. § 214.1, provides, in relevant part, as follows:

(l)(2) An alien admitted or otherwise provided status in . . . TN classification . . . shall not be considered to have failed to maintain nonimmigrant status solely on the basis of a cessation of the employment on which the alien’s classification was based, for up to 60 consecutive days or until the end of the authorized validity period, whichever is shorter, once during each authorized validity period. DHS may eliminate or shorten this 60–day period as a matter of discretion. Unless otherwise authorized under 8 CFR 274a.12, the alien may not work during such a period...

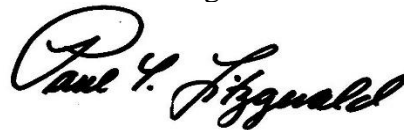
Pursuant the above regulation, the claimant maintained her TN nonimmigrant status for the 60 days between August 15, 2021, and October 13, 2021. During this 60-day period, the claimant remained available for work, as she was permitted to seek other employment and request DHS approval for a new employer in order to legally continue working in the United States. *See 8 C.F.R. § 214.6(i)(1).*³ She in fact secured DHS approval to begin new employment prior to the end of the 60-day period. She began that new job during the week ending October 9, 2021. *See Finding of Fact # 15.*

We, therefore, conclude as a matter of law that the claimant was available to work within the meaning of G.L. c. 151A, § 24(b).

² While not explicitly incorporated into the review examiner’s findings, the content of Exhibits 2 and 3 is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

³ *See also* uscis.gov/newsroom/alerts/options-for-nonimmigrant-workers-following-termination-of-employment (Dec. 19, 2022).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning August 22, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 8, 2023



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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