The claimant resided in the United States on a F1 Student Visa. Upon completion of his degree, USCIS granted him temporary employment authorization to work in optional practical training (OPT) in his field of study, science, technology, engineering or mathematics. DHS regulations impose minimal requirements on employers to be able to employ STEM-OPT visa holders and no restrictions on the maximum number of hours of work or the number of employers. Because the claimant's F1 STEM OPT employment authorization is not employer specific and there's no evidence that employment in the claimant's field of study is limited, the Board held that he is eligible to receive benefits under G.L. c. 151A, § 24(b), because he was authorized to work during his benefit year.

Board of Review
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Issue ID: 0081 6250 32

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 the DUA, effective December 3, 2023, which was denied in a determination issued on August 8, 2024. 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 November 1, 2024. 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 permitted to work in the United States during his benefit year, and, thus, he is 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, as well as DUA's electronic record keeping system, UI Online.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's F-1 STEM OPT (Optional Practical Training) work authorization status which limited his availability to work for only STEM OPT employers was too restrictive, and, thus, he did not meet the requirements of G.L. c. 151A, § 24(b), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant was born in China.

2. The claimant was approved for an academic and language F1 Visa while completing a doctorate degree program in the U.S.

3. The claimant's degree program started on 8/14/15 and ended 5/13/21.

4. The claimant was approved for an F1 Visa extension for OPT-STEM, which is optional practical training in science, technology, engineering, and mathematics.

5. F1 Visa holders approved for OPT-STEM are limited to employment with STEM employers who have gone through a process to be allowed to employ these types of visa holders.

6. The claimant filed an unemployment insurance claim on 12/4/23 and obtained an effective date of his claim of 12/3/23. The base period of the claim is from 10/1/22 to 9/30/23.

7. The claimant had employment authorization through this F1 Visa from 5/27/22 to 5/26/24.

8. The claimant started working for an authorized STEM employer part-time on 3/18/24.

9. The claimant's F1 Visa and employment authorization were extended to 9/30/24.

10. On 7/3/24, the claimant was approved for an H1B Visa effective 10/1/24 to 9/30/27 while working for his current employer.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. We clarify Finding of Fact ## 7, as it is misleading. The claimant possessed a valid Form I-766 USCIS Employment Authorization Document (EAD) authorizing the claimant to work from May 27, 2022, until May 26, 2024. The EAD permits the claimant to work only for STEM OPT E-Verified employers. With respect to Finding of Fact # 9, the record shows that, although the claimant's employment authorization was to set to expire on May 26, 2024, as provided on his EAD, the claimant was issued an I-20 Certificate of Eligibility for Nonimmigrant Status, stating that the claimant had filed for a change in status to H-1B visa and that his F1 employment authorization

had been automatically extended until September 30, 2024.[1] In adopting the remaining findings, we deem 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 has failed to meet his burden to show his availability during the weeks requested in his benefit year.

The review examiner initially denied benefits after concluding the claimant's F1 Visa limited his employment to only qualifying STEM-OPT employers, and that such a restriction limited his availability, which effectively removed him from the workforce. 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 determine that the claimant was 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. Citizenship and Immigration Services (USCIS) under the Department of Homeland Security (DHS).

In this case, we have confined our analysis to the period in which the claimant seeks unemployment benefits, the weeks beginning December 3, 2023, through June 16, 2024.

In 2015, the claimant, a citizen of China, was approved for an F1 Visa to complete his doctorate degree at a university in the United States. *See* Findings of Fact ## 1 and 2. Although the claimant completed his program degree, he opted to continue his F1 student status and was approved for optional practical training (OPT) in his degree of study which must be in the fields of science, technology, engineering or mathematics (STEM). *See* Findings of Fact ## 3 and 4.

[1] The claimant's Form I-766 EAD is Exhibit # 1, and I-20 Certificate of Eligibility for Nonimmigrant Status issued on May 24, 2024, is Exhibit # 8. 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).

The DHS regulation at 8 C.F.R. § 214.2, provides, in relevant part, as follows:

> (f)(10)(ii)(A) Consistent with the application and approval process in paragraph (f)(11) of this section, *a student may apply to USCIS for authorization for temporary employment for optional practical training directly related to the student's major area of study. The student may not begin optional practical training until the date indicated on his or her employment authorization document, Form I-766.* A student may be granted authorization to engage in temporary employment for optional practical training:…
>
> > (3) After completion of the course of study, or, for a student in a bachelor's, master's, or doctoral degree program, after completion of all course requirements for the degree (excluding thesis or equivalent)…

(Emphasis added.)

Furthermore, 8 C.F.R. § 214.2(f)(10)(ii)(C), lists all the requirements that must be met to work as a STEM OPT student, including specific employer requirements. The relevant portions are as follows:

> (*5*) Employer qualification. The student's employer is enrolled in E-Verify, ... and the employer remains a participant in good standing with E-Verify, as determined by USCIS. An employer must also have an employer identification number (EIN) used for tax purposes.
>
> (*6*) Employer reporting. A student may not be authorized for employment with an employer pursuant to paragraph (f)(10)(ii)(C)(2) of this section unless the employer agrees, by signing the Training Plan for STEM OPT Students, Form I-983 or successor form, to report the termination or departure of an OPT student to the DSO at the student's school, if the termination or departure is prior to the end of the authorized period of OPT. Such reporting must be made within five business days of the termination or departure…
>
> (*7*) Training Plan for STEM OPT Students, Form I-983 or successor form**.**
>
> > (i) … A student must submit the Form I-983 or successor form, which includes a certification of adherence to the training plan completed by an appropriate individual in the employer's organization who has signatory authority for the employer, to the student's DSO, prior to the new DSO recommendation.
> >
> > (ii) The training plan described in the Form I-983 or successor form must identify goals for the STEM practical training opportunity, including specific knowledge, skills, or techniques that will be imparted to the student, and explain how those goals will be achieved through the work-based learning opportunity with the employer; describe a performance evaluation process; and describe methods of oversight and supervision. Employers may rely on their otherwise

existing training programs or policies to satisfy the requirements relating to performance evaluation and oversight and supervision, as applicable.

(iii) The training plan described in the Form I-983 or successor form must explain how the training is directly related to the student's qualifying STEM degree.

(iv) If a student initiates a new practical training opportunity with a new employer during his or her 24-month OPT extension, the student must submit, within 10 days of beginning the new practical training opportunity, a new Form I-983 or successor form to the student's DSO, and subsequently obtain a new DSO recommendation.

(8) Duties, hours, and compensation for training. The terms and conditions of a STEM practical training opportunity … including duties, hours, and compensation, must be commensurate with terms and conditions applicable to the employer's similarly situated U.S. workers in the area of employment. A student may not engage in practical training for less than 20 hours per week…

(9) Evaluation requirements and Training Plan modifications.

(i) A student may not be authorized for employment with an employer pursuant to paragraph (f)(10)(ii)(C)(2) of this section unless the student submits a self-evaluation of the student's progress toward the training goals described in the Form I-983 or successor form. All required evaluations must be completed prior to the conclusion of a STEM practical training opportunity, and the student and an appropriate individual in the employer's organization must sign each evaluation to attest to its accuracy.

(ii) If any material change to or deviation from the training plan described in the Form I-983 or successor form occurs, the student and employer must sign a modified Form I-983 or successor form reflecting the material change(s) or deviation(s)…The student and employer must ensure that the modified Form I-983 or successor form is submitted to the student's DSO at the earliest available opportunity.

(10) Additional STEM opportunity obligations. A student may only participate in a STEM practical training opportunity in which the employer attests, including by signing the Form I-983 or successor form, that:

(i) The employer has sufficient resources and personnel available and is prepared to provide appropriate training in connection with the specified opportunity at the location(s) specified in the Form I-983 or successor form;

(ii) The student on a STEM OPT extension will not replace a full- or part-time, temporary or permanent U.S. worker; and

(iii) The student's opportunity assists the student in reaching his or her training goals.

Based upon the claimant's I-20 Certificates of Eligibility for Nonimmigrant Status, the claimant graduated from the University of [City] with a doctorate degree in Geophysics and Seismology.[2] USCIS granted the claimant authorization to work in optional practical training based upon his qualifying degree beginning May 27, 2022, through September 30, 2024. *See* Findings of Fact ## 4, 7 and 9. Because the claimant was granted entry into the United States on an F1 Visa and received employment authorization documentation from USCIS to work in his major area of study, the claimant was legally permitted to be in the United States and authorized to work during that period.

However, the review examiner denied benefits based on her reasoning that the claimant was restricted to working for only STEM employers who met DHS regulations, and that such restrictions limited his employability as such to make himself unavailable for work. We disagree.

Pursuant to the above DHS regulations, a STEM OPT employer must be an E-Verified employer in good standing and have a valid United States tax identification number.[3] The employer is also required to sign the claimant's practical training Form I-983 and its attestation clause.[4] However, we do not believe that these administrative requirements are so restrictive that they limit the number of eligible employers.

We note that E-Verify is an official government electronic database system that allows employers to validate the information taken from an individual's I-9 to verify that the person is authorized to work by DHS and the Social Security Administration.[5] To become an E-Verified employer, one must enroll on the government's website and enter the company's name and address, answer a few questions, and sign a memorandum of understanding.[6] The enrollment process is not restrictive to any specific type of employer. This means that any potential STEM OPT employer may voluntarily become an E-Verified employer.

Although the federal regulations state the minimum number of hours an E-Verified employer must offer a STEM OPT student, there are no restrictions on the maximum number of hours one can work.[7] This means that the claimant can work full-time, and that he can work for more than one E-Verified STEM employer at any given time. It also means that his USCIS work EAD is not restricted to a specific E-Verified STEM employer. [8]

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[2] The claimant's I-20 Certificates of Eligibility for Nonimmigrant Status contained in Exhibits 1 and 8 are both part of the unchallenged evidence in the record.
[3] *See* 8 C.F.R. § 214.2(f)(10)(ii)(C)(5).
[4] *See* 8 C.F.R. §§ 214.2(f)(10)(ii)(C)(6) and (10).
[5] *See* U.S. Department of Homeland Security, About E-Verify | E-Verify (last visited Jan. 15, 2025)
[6] *See* U.S. Department of Homeland Security, Enrolling in E-Verify | E-Verify (last visited Jan. 15, 2025)
[7] *See* 8 C.F.R. § 214.2(f)(10)(ii)(C)(8).
[8] We distinguish this case from Board of Review Decision # 0082 5819 02 (Oct. 30, 2024). In that case, the claimant had an H-1B Visa, and, although she was able to reside in the U.S. during the 60-day grace period and seek work during that period, the claimant was not authorized to work until such time as a new employer filed an H-1B petition on her behalf. The restrictions on H-1B Visa holder also limit the holder to working for only one employer.

In addition, since the claimant had already obtained express authorization to work as a STEM OPT student from USCIS, any subsequent employment pursuant to that authorization is not contingent upon the filing of Form I-983 Training Plan prior to the commencement of work. New employers have ten days from the commencement of employment to submit Form I-983 to the students' Designated School Official (DSO).[9] This means that there are no restrictions which must be satisfied *prior* to the claimant starting any new STEM OPT employment.

Furthermore, the record before us contains no evidence that employment directly related to the claimant's major area of study (STEM) is so limited that it essentially removes him from the workforce. In fact, the claimant's continued claim summaries, as recorded in the DUA's electronic record keeping system, UI Online, show that the claimant has applied to three or more such positions each week within his field of study. These summaries provide a detailed work search log, attesting to the diligence and consistency of claimant's work search activities, and the availability of jobs within the scope of his employment authorization during the weeks at issue. Thus, the claimant has shown that work directly related to his degree of study was available.

We, therefore, conclude as a matter of law that the claimant has met his burden to show that the USCIS has authorized him to work full-time in the United States, as required pursuant to G.L. c. 151A § 24(b), during the weeks claimed.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning December 3, 2023, through week ending June 15, 2024, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 30, 2025

Paul T. Fitzgerald, Esq.
Chairman

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.

[9] *See*, 8 C.F.R. § 214.2(f)(10)(ii)(C)(7)(iv).

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.

DY/rh