The claimant, a citizen of India, who was authorized to reside and work in the United States on an H-1B nonimmigrant visa, was laid off due to lack of work. Although DHS regulations grant H-1B visa status holders a 60-day grace period to legally remain in the United States upon losing a job, the claimant is not authorized to work until such time as a new employer files an H-1B petition sponsoring the claimant. Because she could not find a new employer to do so, the Board held that she is disqualified from receiving benefits under G.L. c. 151A, § 24(b), because she was not authorized to work during her benefit year.

Board of Review
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Issue ID: 0082 5819 02

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 separated from her position with the employer on March 29, 2024. She filed a claim for unemployment benefits with the DUA, effective March 31, 2024, which was denied in a determination issued on May 8, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 21, 2024. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not available for full-time work and, thus, she was disqualified 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 before the Board is whether the review examiner's decision, which concluded that the claimant's nonimmigrant H-1B status limited her availability to work to the point that she effectively removed herself from the workforce, 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, who is originally from India, arrived in the United States in 2016.

2. The claimant has an H-1B visa (the H-1B) from the United States Citizenship and Immigration Services (USCIS). Under the H-1B, the claimant, who is a

research scientist, is allowed to work only if she is sponsored by a particular employer. The claimant is not authorized to work without a specific employer sponsoring her.

3. The claimant most recently worked as a research associate for a biotechnology company who sponsored her for approximately 2 years and 3 months.

4. On March 29, 2024, the claimant was laid off due to a lack of work.

5. The claimant filed a claim for unemployment benefits effective March 31, 2024.

6. Since filing her claim, the claimant has been told by approximately 10 to 15 prospective employers that they cannot hire her because they do not provide employment sponsorship.

7. As of June 13, 2024, the claimant has not found an employer to sponsor her for employment since filing for unemployment benefits.

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, while we agree with the review examiner's legal conclusion that the claimant is not legally available to work in the United States, we do so on different grounds.

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, the DUA 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 her benefit year, she was legally authorized to work by the appropriate U.S. agency, currently the U.S. Citizenship and Immigration Services (USCIS), which is part of the Department of Homeland Security (DHS). Here, the claimant seeks unemployment benefits under a claim effective March 31, 2024. Consequently, the claimant must show that she was authorized to work during her benefit year, beginning March 31, 2024.

In 2016, the claimant arrived in the United States as a citizen of India. *See* Finding of Fact # 1. USCIS granted the claimant an H-1B visa, based upon sponsorship by her then-employer, to work as a research scientist. *See* Finding of Fact # 2. However, on March 29, 2024, the claimant was laid off by her employer due to lack of work. *See* Finding of Fact # 4.

In order to determine the claimant's eligibility for benefits, we must consider and apply several regulations promulgated by the DHS. The first is the DHS regulation at 8 C.F.R. § 214.1, which provides, in relevant part, as follows:

> (l)(2) An alien admitted or otherwise provided status in . . . H-1B 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. . . .*

(Emphasis added.)

We must also consider 8 C.F.R. 214.2(h)(2)(i), which states, in relevant part:

> (D) Change of employers. If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on the form prescribed by the USCIS . . . Except as provided by 8 CFR 274a.12(b)(21) or section 214(n) of the Act, 8 U.S.C. § 1184(n), *the alien is not authorized to begin the employment with the new petitioner until the petition is approved. . . .*
>
> (H) H-1B portability. An eligible H-1B nonimmigrant is authorized to start concurrent or new employment under section 214(n) of the Act upon the filing . . . of a nonfrivolous H-1B petition on behalf of such alien, or as of the requested start date, whichever is later.
>
> (1) Eligible H-1B nonimmigrant. For H-1B portability purposes, an eligible H-1B nonimmigrant is defined as an alien:

> (*i*) Who has been lawfully admitted into the United States in, or otherwise provided, H-1B nonimmigrant status;
>
> (*ii)* On whose behalf a nonfrivolous H-1B petition for new employment has been filed . . . with a request to extend the H-1B nonimmigrant's stay, before the H-1B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires; and
>
> (*iii*) Who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.
>
> (2) Length of employment. Employment authorized under paragraph (h)(2)(i)(H) of this section automatically ceases upon the adjudication of the H-1B petition described in paragraph (h)(2)(i)(H)(1)(*ii*) of this section.

(Emphasis added.)

Finally, we consider 8 C.F.R. 274a.12(b), which states, in relevant part, as follows:

> The following classes of aliens are authorized to be employed in the United States by the specific employer and subject to any restrictions described in the section(s) of this chapter indicated as a condition of their parole or of their admission in, or subsequent change to, the designated nonimmigrant classification. An alien in one of these classes is not issued an employment authorization document by DHS: …
>
> (9) . . . *In the case of a nonimmigrant with H-1B status, employment authorization will automatically continue upon the filing of a qualifying petition under 8 CFR 214.2(h)(2)(i)(H) until such petition is adjudicated*, in accordance with section 214(n) of the Act and 8 CFR 214.2(h)(2)(i)(H).

(Emphasis added.)

The record before us establishes that the claimant maintained her H-1B status for 60 days. However, under the above cited DHS regulations, this merely permitted her to legally remain in the United States during that period. These regulations prohibit the claimant from working until such time as a new employer files an H-1B petition on her behalf. *See* Board of Review Decision BR-109625 (May 26, 2010).[1] Because the claimant was unable to find a new employer that would file a new H-1B petition on her behalf during her grace period, she was not authorized to work. *See* Findings of Fact ## 6 and 7. Thus, the claimant has failed to show that she was legally available to work during her benefit year.

We, therefore, conclude as a matter of law that the claimant was not available to work within the meaning of G.L. c. 151A, § 24(b).

[1] We note that in Board of Review Decision # 0072 3695 84 (Nov. 8, 2023), we inconsistently concluded that the claimant was available for work without applying the USCIS regulations, which set the appropriate legal standard for determining availability for nonimmigrant claimants. For this reason, we decline to follow that decision.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending April 6, 2024, and for subsequent weeks, until such time she has obtained work authorization from the USCIS.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 2024

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.

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