

**To be available for work under G.L. 151A, § 24(b), the claimant, a non-citizen, must show USCIS employment authorization during his benefit year. The claimant demonstrated that, as a student F-1 visa holder, he had USCIS employment authorization during portions of his benefit year. Therefore, he is eligible for PUA benefits only during these periods.**

**Board of Review  
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**Issue ID: N6- FJV8-NP9R**

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 Pandemic Unemployment Assistance (PUA) benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant filed a claim for PUA benefits with the DUA, effective March 22, 2020, which was denied in a determination issued on August 19, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied PUA benefits in a decision rendered on March 1, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to show that he was authorized to work, and, thus, the claimant was disqualified 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 take additional testimony and review documents related to the claimant's work authorization status. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that claimant was not legally authorized to work in the United States during his benefit year and was not eligible to receive PUA benefits, is supported by substantial and credible evidence and is free from error of law, where the claimant has presented Post-Completion Optional Practical Training (OPT) approval and a new Employment Authorization Card showing work authorization beginning March 26, 2021.

Findings of Fact

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

1. The claimant filed a claim for Pandemic Unemployment Assistance (PUA) effective March 22, 2020.

2. The claimant was issued a letter from the Department of Unemployment Assistance (DUA) on May 4, 2020, asking the claimant to provide documents to establish valid work authorization to determine his eligibility to receive unemployment benefits.
3. The claimant received a Notice of Non-Monetary Issue Determination-Work Authorization issued June 23, 2020. The letter states that the claimant did not meet the eligibility requirements to receive PUA benefits.
4. The claimant received a Notice of Non-Monetary Issue Redetermination-Work Authorization issued August 4, 2020. The letter states that the claimant did not meet the eligibility requirements to receive PUA benefits.
5. When filing for PUA, the claimant indicated he was not a United States citizen. The claimant is from Argentina.
6. The claimant was admitted to the United States January 10, 2017, as a F-1 class entrant. The visa was issued on November 1, 2016 and expired on August 31, 2020.
7. Prior to filing for PUA, the claimant was a student at a Massachusetts music college pursuing a degree in music performance. The claimant worked for his college as a performer, performance supervisor, and sound engineer. In addition, he worked at the front desk of his college's writing center.
8. The claimant filed his PUA claim because the writing center closed on March 16, 2020 and all performances were cancelled in response to the COVID-19 pandemic.
9. The claimant graduated with his bachelor's degree on December 18, 2020.
10. On May 5, 2020, the associate director of international student services at the claimant's college issued an I-20 Certificate of Eligibility for Nonimmigrant Student Status form for the claimant. The current session listed on the I-20 ran from January 21, 2020 to May 8, 2020. The purpose of the I-20 was to extend the claimant's session because the end date had been incorrectly entered. The form did not list any employment authorizations.
11. In October of 2020, the claimant applied for employment authorization, specifically Post-Completion Optional Practical Training (OPT). His application included an I-765 application form, an I-94 form record number 71628469056, and another I-20 Certificate of Eligibility for Nonimmigrant Student Status form.
12. The I-20 form in the claimant's OPT application was issued by the international student advisor at his college on October 14, 2020. The current session listed

on the I-20 ran from September 8, 2020 to December 18, 2020. The form requested a full year of OPT for the claimant, beginning on January 3, 2021 and ending January 2, 2022.

13. The application was delivered to the United States Citizenship and Immigration Services by October 27, 2020.
14. USCIS sent a rejection notice, Form I-797C to the claimant, care of his college, with a notice date of December 11, 2020. The claimant's I-765 application was rejected because the payment amount was incorrect and because the 'Reason for Applying' field was not completed.
15. According to the rejection notice, "[the claimant's] rejected benefit request will not retain a filing date. [The claimant] may resubmit [the claimant's] benefit request as a new filing if [the claimant] is able to correct the issue that caused the rejection."
16. The claimant's college was closed for the winter break, so the claimant did not learn his application was rejected until January 5, 2021.
17. On January 12, 2021, the claimant resubmitted his corrected I-765 application.
18. The claimant's resubmitted application included a completed I-20 Certificate of Eligibility for Nonimmigrant Student Status. The second page of the I-20 still requested a full year of OPT for the claimant, beginning on January 3, 2021 and ending January 2, 2022.
19. On January 23, 2021, the claimant received a notice of receipt from USCIS, Form I-797C, indicating that USCIS received his corrected I-765 application on January 14, 2021.
20. On March 26, 2021, the claimant received a notice of action, Form I-797, from USCIS approving his corrected I-765 application. The claimant's eligibility class on the notice of actions was listed as C03B.
21. On March 26, 2021, the claimant received his Employment Authorization Card. The card is valid from March 26, 2021 through March 25, 2022. The category is C03B. The "Terms and Conditions" are listed as "Stu: Post-Completion Opt."
22. The claimant submitted no documents showing he was authorized to work between December 18, 2020 and March 25, 2021.
23. Since filing his PUA application, the claimant has been available for part time and full-time work.

Credibility Assessment:

During the first hearing, the claimant offered for the record his I-765 Application for Employment Authorization, including an I-20 Certificate and an I-94 Record Form. This application requested a full year of OPT for the claimant, from January 3, 2021 until January 2, 2022. The claimant testified that he had worked for his college until the college shut down the campus in response to the COVID-19 pandemic. The claimant did not know the status of his I-765 application and was not approved by USCIS to work with an employer other than his school. The claimant did not present any documents showing that he was authorized to work during his benefit year.

During the remand hearing, the claimant provided credible testimony and documentary evidence that his original I-765 Application for Employment Authorization was rejected, that the claimant submitted a corrected I-765 Application for Employment authorization on January 12, 2021, and that he was approved to work in the United States between March 26, 2021 and March 25, 2022. The claimant testified that he was not authorized to work for any entity other than one associated with his college until March 26, 2021, although he was available for either part time or full-time work.

### 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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we disagree with the review examiner's legal conclusion that claimant was not legally authorized to work in the United States during his benefit year and was not eligible to receive PUA benefits.

The claimant in this case seeks PUA benefits, a new unemployment benefit program provided under § 2102 of the CARES Act of 2020 and administered by the U.S. Secretary of Labor.<sup>1</sup> In order to qualify for PUA benefits, the claimant must show that he is available for work within the meaning of state law.<sup>2</sup>

The review examiner initially denied benefits after concluding the claimant had not established that he was legally authorized to 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 . . . .

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<sup>1</sup> Pub. L. 116-136 (Mar. 27, 2020), § 2102.

<sup>2</sup> See CARES Act, § 2102(a)(3)(A)(ii)(I).

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 USCIS.

The claimant filed a claim for PUA with an effective date of March 22, 2020. *See* Consolidated Finding # 1. The review examiner found that the claimant held an F-1 Visa valid from November 1, 2016, until August 31, 2020, and the claimant provided a Form I-20 with a program end date of December 18, 2020. *See* Consolidated Finding # 12. An F-1 Visa allows a claimant to work up to twenty hours per week while school is in session and full-time while school is not in session. 8 C.F.R. § 274a.12(b)(6). The F-1 Visa can be extended if, as here, a Designated School Official (DSO) issues a new Form I-20. *See* Consolidated Finding # 12; *see also* 8 C.F.R. § 214.2(f)(7). The review examiner found that, though the claimant was enrolled in school, he had a history of working while enrolled in school. *See* Consolidated Finding # 7. From this we can reasonably infer that he was available for work for some portion of the day. Because the claimant holds an F-1 Visa, federal law allows the claimant to work on-campus and at some off-campus jobs. *See* 8 C.F.R. § 214.2(f)(9). The claimant is therefore available from the effective date of his claim, March 22, 2020, through December 18, 2020, the period covered by his Form I-20.

The review examiner also found that the claimant was not authorized to work in the United States from December 19, 2020, through March 25, 2021. *See* Consolidated Finding # 22. However, after remand, the review examiner found that the claimant’s Post-Completion Optional Practical Training (OPT) application for employment authorization was approved by the USCIS on March 26, 2021, through March 25, 2022. *See* Consolidated Findings ## 20–21 and Remand Exhibits 5 and 7. While the claimant is ineligible for PUA benefits from December 19, 2020 until March 25, 2021, he has nevertheless established that he became available for work and thus eligible for benefits again as of March 26, 2021.

We, therefore, conclude as a matter of law that the claimant was authorized to work within the meaning of G.L. c. 151A, § 24(b), during discrete periods of his benefit year, including March 22 – December 18, 2020, and beginning again on March 26, 2021.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is entitled to receive PUA benefits starting with the week beginning March 22, 2020, through December 19,

2020, if otherwise eligible. The claimant is denied PUA benefits from the week beginning December 20, 2020, through March 27, 2021. The claimant is also entitled to receive benefits beginning March 28, 2021, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 15, 2022**



Paul T. Fitzgerald, Esq.  
Chairman



Michael J. Albano  
Member

Member Charlene A. Stawicki, 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](http://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.

TJG/rh