THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

BOARD OF REVIEW DECISION

BR-109625 (May 26, 2010) - Canadian citizen was ineligible for benefits under G.L. c. 151A, sec. 24(b), because he was not authorized to work during the benefit year. When he lost his job, the claimant lost his H-1B visa status, which had allowed him to work for that employer only. Although he resided here lawfully during the benefit year under an H-4 visa, Department of Homeland Security regulations prohibit his employment until the claimant gets a visa classification that authorizes him to work.

Introduction and Procedural History of this Appeal

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

The claimant was laid off by his most recent employer on November 19, 2008. He filed a claim for unemployment benefits with the DUA but was disqualified in a determination issued by the agency on February 19, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which the claimant attended, a review examiner affirmed the agency's initial determination in a decision rendered on April 6, 2009.

The review examiner denied the claimant, a Canadian citizen residing in Massachusetts, benefits because she concluded that he did not have authorization to work in the United States. After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's appeal, we accepted this case to allow the claimant to submit his reasons either agreeing or disagreeing with the review examiner's decision. The claimant did not submit a response for our consideration. Accordingly, our review of the decision is based on the record below and the claimant's appeal.

The issue before the Board is whether the claimant was legally authorized to work in the United States after he changed his visa status from an H-1B status to an H-4 status as a dependent of his wife.

Findings of Fact

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

1. The claimant filed a claim for unemployment benefits on December 31, 2008. The effective date of the claim is December 28, 2008. The claimant's weekly unemployment benefit amount was established to be $628. A $25 dependency allowance is applicable to this claim.

2. After his claim was approved by the Division of Unemployment Assistance ("DUA"), the claimant began to receive unemployment benefits. During the 6 weeks ending January 10, 2009 through February 14, 2009, the claimant received unemployment benefits. During those weeks, the claimant received total benefit payments in the total amount of $3,918.00.

3. The claimant is a Canadian citizen. As a Canadian national, the claimant may obtain work authorization under the North American Free Trade [Agreement] ("NAFTA"). As qualified citizen of Canada, the claimant may apply for and receive TN status at a United States ("US") port of entry. To request TN status, the claimant must provide a written offer of employment from a US employer.

4. In 2006, the claimant entered the US and began work under a TN visa approved by the Immigration and Naturalization Service ("INS").

5. On April 13, 2007, the claimant received a "Notice of Action" indicating the petition filed by his most recent employer for an H1B visa was approved. Under an H1B visa approved by the INS, the claimant could legally work in the US for the employer who filed the petition. The claimant's H1B visa was valid from October 1, 2007 through September 7, 2010.

6. The claimant worked as a "Quantum Research Analyst" for his most recent employer until he was laid off on November 19, 2008.

7. After he was laid off, the claimant crossed the Canadian border and applied for an H4 visa as a dependent of his wife who has an H1B visa. The claimant's change of status to an H4 visa is effective December 12, 2008.

8. To work legally in the US under the H1B visa, the claimant must obtain sponsoring employment. To work legally in the US under the TN visa, the claimant must obtain a written offer of employment from a US employer. As of the date of hearing (April 1, 2009), the claimant has not obtained sponsoring employment or a written offer of employment from a US employer.

9. Since filing his claim, the claimant has sought work for which he is qualified by means of an outplacement service, conducting online employment searches and networking at least 3 days per week.

10. On February 19, 2009, a "NOTICE OF REDETERMINATION AND OVERPAYMENT" ("the Redetermination") issued by the DUA states, "… You worked in the United States on an employer specific visa. This visa allows you to work for only one employer and when the employer-employee relationship ends, you are out of status on your visa. Therefore, you do not meet the requirements of [Section 24(b)] of the Law and are subject to disqualification." The claimant was responsible for returning benefit payments in the amount of $3,918.00 which were received for the 6 weeks ending January 10, 2009 through February 14, 2009. The overpayment was due to an error without fraudulent intent.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem those adopted findings of fact to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

Although the review examiner found that the claimant has been actively engaged in a search for work which he was qualified to do, eligibility was denied. The review examiner concluded that the claimant is not lawfully authorized to work in the United States. We agree.

The claimant's eligibility for benefits should be evaluated under G.L. c. 151A, § 24(b), which states, in relevant part, the following:

> 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. . . .

Since the claimant is not a U.S. citizen, our analysis must incorporate federal law governing immigration. There is no question that during the base period, the claimant was authorized to work under H-1B status. As a general rule, however, upon losing his job, the claimant loses that authorization to work under the H-1B visa, which is employer-specific. *See* U.S. Department of Labor Federal-State Unemployment Compensation Program; Unemployment Insurance Program Letters Interpreting the Federal Unemployment Insurance Law (August 20, 1986).

The U.S. Department of Labor (DOL) regulations governing eligibility for unemployment insurance require that an alien must be legally authorized to work by the appropriate U.S. agency in order to be considered "available for work." Specifically, 20 CFR § 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. (Emphasis added.)

Thus, in order to find the claimant available for work under G.L. c. 151A, § 24(b), the claimant must be legally authorized to work by the appropriate U.S. agency, currently the U.S. Department of Homeland Security (DHS).

DHS requires that an alien classified as a nonimmigrant obtain permission to engage in employment in the U.S. This rule is found at 8 CFR § 214.1—Requirements for admission, extension, and maintenance of status. It states, in relevant part, as follows:

> (e) Employment.
>
> A nonimmigrant in the United States in a class defined … as a temporary visitor for pleasure, or … as an alien in transit through this country, may not engage in any employment. **Any other nonimmigrant in the United States may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission** to engage in employment in accordance with the provisions of this chapter. **A nonimmigrant who is permitted to engage in employment may engage only is such employment as has been authorized**… (Emphasis added.)

As a citizen of Canada, the claimant also qualifies as a North American Free Trade Agreement (NAFTA) professional. In order for a NAFTA professional to change employers, a new employer must file a Form I-129 seeking DHS approval to employ the claimant. This applies whether the claimant seeks permission under a TN or an H-1B visa.

The relevant portions of the DHS regulations are as follows:

> 8 CFR § 214.2—Special requirements for admission, extension, and maintenance of status.
>
> (h) Temporary employees—
>
> (2) Petitions
>
> (i) Filing of petitions—(A) … A United States employer seeking to classify an alien as an **H-1B** … temporary employee must file a petition on Form I-129, Petition for Nonimmigrant Worker … (Emphasis added.)

> (D) Change of employers. … [T]he alien is not authorized to begin the employment with the new petitioner until the petition is approved. . .

> 8 CFR § 214.6—Citizens of Canada or Mexico seeking temporary entry under NAFTA to engage in business activities at a professional level.

> (i) Request for change or addition of United States employers—

> (1) Filing at the services center. A citizen of Canada or Mexico admitted into the United States as a **TN** nonimmigrant who seeks to change … a United States employer during the period of admission must have the new employer file a Form I-129 … **Employment with a different … employer is not authorized prior to Department approval of the request**. (Emphasis added.)

Under these regulations, the claimant cannot start working until the new employment is approved.[1] Moreover, DHS has promulgated further regulations, which provide that while lawfully here as a family member under an H-4 visa, he may not accept employment until he gets his own nonimmigrant classification authorizing employment. DHS regulation 8 CFR § 214.2(h), provides, in relevant part, as follows:

> (9) Approval and validity of petition—

> (iv) Spouse and dependents [of **H-1B** holder] … Neither the spouse nor a child of the beneficiary may accept employment unless he or she is the beneficiary of an approved petition filed in his or her behalf and has been granted a nonimmigrant classification authorizing his or her employment. (Emphasis added.)

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[1] Recent amendments to the Immigration and Naturalization Act grant provisional work authorization upon the filing of a petition by a new employer. See 8 USC § 1184(n)—Increased portability of H-1B status.

> (1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa … is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant … Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

> (2) A nonimmigrant alien described in the paragraph is a nonimmigrant alien—

> (A) who has been lawfully admitted into the United States;

> (B) on whose behalf an employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and

> (C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.

In light of this express prohibition of employment by spouses of H-1B holders, we must rule that the claimant was not authorized to work after his visa status changed to H-4.

Since the Board is now aware of these very specific federal rules, we decline to follow any prior Board decisions, which held NAFTA professionals to a less rigorous availability standard under G.L. c. 151A, § 24(b).

The review examiner's decision is affirmed. The claimant is not entitled to benefits for the week ending January 3, 2009 and for subsequent weeks, while his immigration status remains classified as H-4.

BOSTON, MASSACHUSETTS
DATE OF MAILING - May 26, 2010

John A. King, Esq.
Chairman

Stephen M. Linksy, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

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

LAST DAY TO FILE AN APPEAL IN COURT – June 25, 2010

AB/rh