CHAPTER 19
FOREIGN NATIONALS

2.19.1 Introduction....1
2.19.2 Work Authorization Documents....2
2.19.3 Humanitarian Programs....3
2.19.4 Valid Original Claim....4
2.19.5 Temporary Workers....6
2.19.6 Certifications....7

2.19.1 INTRODUCTION

In order to be eligible for unemployment insurance benefits, foreign nationals must have been lawfully admitted into the United States for permanent residence, legally authorized to work in the United States, or permanently residing in the United States under color of law, including a claimant present in the United States pursuant to 8 USC §§ 1157 and 1158 (refugees and asylees).[1] The legal issues that will arise in our hearings will be whether the claimant can file a valid original claim under Labor Law § 527 and whether the claimant is ready, willing, and able to work, as required under Labor Law § 591.

A claimant who is a foreign national must be in possession of a valid employment authorization document in order to work in the United States.[2] Claimants who were not legally authorized to work in the United States during their base period may not file a valid original claim. Claimants who had a valid work authorization during their base period may be able to file a valid original claim but if the work authorization is no longer valid after the claim is filed, the claimant will not be available for employment.

A foreign national married to a United States citizen is not available for employment solely by reason of the marriage.[3] Marriage to a United States citizen does not automatically confer

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[1] Labor Law § 590 (9): Benefits based on employment performed by illegal aliens.

> (a) Remuneration received by a claimant who was an alien at the time such remuneration was paid shall not be taken into consideration for the purpose of establishing rights to benefits under this article unless the claimant was then lawfully admitted for permanent residence in the United States, was then lawfully present for purposes of performing such services or was then permanently residing in the United States under color of law, including a claimant lawfully present pursuant to section 207 or 208 of the federal immigration and nationality act.
>
> (b) A determination that benefits are not payable to a claimant because of the claimant's alien status shall be made only upon a preponderance of the evidence and shall be effective only if it is in conformity with section 3304 (a) (14) of the federal unemployment tax act.
>
> (c) Any data or information required of a claimant to determine whether benefits are not payable to him because of his alien status shall be uniformly required from all claimants.
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> (d) An alien who is not eligible under 8 USC 1621(a) shall be eligible for benefits, provided such alien is eligible for benefits under the provisions of this article and section 3304 (a) (14) of the federal unemployment tax act.

[2] *Matter of Diamond*, 201 A.D.2d 835 (3d Dep't 1994); *Matter of Enrique*, 13 A.D.3d 967 (3d Dep't 2004); Appeal Board No. 547761 (claimant's work authorization was valid through February 28, 2009; he did not obtain a new work authorization until March 25, 2009 and was not available for employment from March 1 to March 24, 2009).

[3] Appeal Board No. 528174 (marriage to a United States citizen does not establish that the individual is legally authorized to work in the United States).

citizenship or permanent residency in the United States; and such an individual must still apply for authorization to work in the United States.[4]

2.19.2 WORK AUTHORIZATION DOCUMENTS

Federal law prohibits employers from knowingly hiring foreign nationals who are not legally authorized to work in the United States.[5] In order to comply with the law, employers are required to fill out a Form I-9 for all new employees, who must provide proof of identity and proof of work authorization.[6] If the claimant has documents that will allow the employer to fill out Form I-9, the claimant is legally authorized to work under Federal law and under the provisions of Labor Law § 590 (9).[7]

An employer who acquires another company or merges with another company and retains the other company's employees may treat those employees as continuing in employment or as new hires. In the former instance, the employer only needs to obtain the I-9s completed by the other company; in the latter, the employer must fill out new I-9s. If an employee's work authorization is set to expire while the employee is still employed, the employer must re-verify the authorization prior to the expiration of the existing work authorization.[8]

There are three types of documents that will establish an individual's authorization to work in the United States. "List A" documents establish both identity and authorization to work; "List B" documents establish identity only; "List C" documents work authorization only. An individual presenting a document from List A does not need to present any other document; otherwise,

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[4] *Matter of Bruyne*, 95 A.D.3d 1590 (3d Dep't 2012) (claimant, a Surinam national, had a work authorization which expired in 1999; in 2005, she married a US citizen but was unable to file a valid original claim as she had not obtained a new work authorization).

[5] The Immigration Reform and Control Act of 1986; Immigration Act of 1990; Illegal Immigration Reform and Immigrant Responsibility Act of 1996; and 8 USC §§ 270, 274.

[6] The following categories of employees are exempt from the Form I-9 requirements: Employees hired on or before Nov. 6, 1986, whose employment is continuing and who have a reasonable expectation of employment at all times; individuals hired for casual domestic work in a private home on a sporadic, irregular, or intermittent basis; independent contractors or individuals providing labor who are actually employees of a contractor (such as employee leasing or temporary agencies) providing contract services; and individuals not physically working in the US. *See* https://www.uscis.gov/i-9-central/complete-correct-form-i-9/who-needs-form-i-9/who-needs-form-i-9 (last visited December 4, 2019).

[7] See fn. 1, above.

[8] https://www.uscis.gov/i-9-central/51-reverifying-employment-authorization-current-employees (last visited May 17, 2019).

individuals must present a document from List B and a document from List C.[9] An individual who has applied for a Green Card must still apply for authorization to work in the United States while the Green Card application is pending.

Individuals who have been given temporary protected status (TPS) may have their existing employment authorization documents extended automatically by the U.S. Citizenship and Immigration Services (USCIS). The document itself will not be renewed; automatic extensions are announced in the Federal Register.[10] Individuals from countries with Deferred Enforced Departure (DED) status will also have their employment authorization documents extended automatically by USCIS.[11]

2.19.3 HUMANITARIAN PROGRAMS

Individuals admitted as refugees[12] are authorized to work in the United States immediately upon entry. The U.S. Citizenship and Immigration Services (USCIS) will give the individual a Form I-94 (a List A document) at the port of entry and file an application for employment authorization

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[9] Examples of the documents from each list include:

List A: US Passport; Permanent Resident Card (the "Green Card"); Permanent Alien Registration Receipt (Form I-551); Employment Authorization Card containing a photograph; or a Foreign Passport with either a temporary I-551 stamp or a Form I-94 (Arrival/Departure Record) with an endorsement authorizing the individual's employment with a specific employer and for a finite period of time.

List B: Driver's license; other governmental ID card containing a photograph or description of the card holder; a school ID card with a photograph; voter registration card; US military (or military dependent) card; Native American tribal document; or a Canadian driver's license.

List C: Unrestricted Social Security card (a restricted card will have an endorsement that it is not valid for employment or is valid for work only with a work authorization); Certificate of Birth Abroad issued by the US Department of State; or various other ID cards issued by the Federal government. (*See, e.g.,* Appeal Board No. 544030 (claimant, a citizen of Haiti, had lived in the US for 30 years at the time of the hearing; his Social Security card had no restriction. Claimant was held to be authorized for employment)).

[10] As of March 1, 2019, employment authorizations for TPS individuals from Sudan, Nicaragua, Haiti, and Salvador were extended through January 2, 2020 (www.federalregister.gov/documents/2019/03/01-03783, (last visited December 4, 2019). As of March 8, 2019, the Department of Homeland Security extended TPS status for individuals from South Sudan through November 2, 2020 (www.dhs.gov/news/2019/03/02 (last visited March 28, 2019).

[11] Currently, the only country covered by DED is Liberia; its DED status has been extended through March 30, 2020; employment authorization documents have been automatically extended through September 27, 2019 but may be extended through March 30, 2020 upon application by the individual (84 FR 13059).

[12] 8 USC § 1157.

for the refugee. An individual whose application for asylum is granted[13] is authorized to work upon the grant. An asylee is not required to apply for an employment authorization document.

Individuals who are otherwise ineligible for admission into the United States may be paroled into the United States for a temporary period for urgent humanitarian reasons.[14] Parolees may be given temporary employment authorization.

2.19.4 VALID ORIGINAL CLAIM

A claimant's base period remuneration may not be considered if the claimant was not authorized to work in the United States at the time the remuneration was earned. Even if the claimant had been authorized to work at the time the employment started, any remuneration earned after the expiration of the work authorization cannot be counted towards establishing a valid original claim.[15] The claimant's application to renew an employment authorization card does not render the claimant authorized for employment until a new card is issued.[16]

A claimant without work authorization documents may be able to establish entitlement to benefits if the claimant is residing in the United States under color of law. Such claimants include refugees, asylees, and parolees.[17] A claimant who was a Cuban national paroled into the United States in 1980 was found eligible to receive benefits even though he was not in possession of work authorization permit during his base period.[18] Where a claimant's continued residence is known to the United States and no departure procedures are contemplated, the

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[13] 8 USC § 1158.

[14] 8 USC § 1182 (d) (5).

[15] *Matter of Gibei*, 284 A.D.2d 784 (3d Dep't 2001) (claimant worked until January 2000, but her work authorization card had expired on February 15, 1999).

[16] Appeal Board No. 550454 (claimant's employment authorization expired January 17, 2007; the claimant continued to work without an authorization document; he applied to renew his employment authorization on September 28, 2009).

[17] 26 USC § 3304 (a) (14) (A).

[18] Appeal Board No. 556661 (the claimant was held to be eligible from October 1, 2008, to August 27, 2010 (claimant received a new employment authorization card from USCIS on that date); see, also, Appeal Board No. 563466 (claimant, a Cuban national with refugee status, entered the United States in 1980, he had an alien registration number and an unrestricted Social Security card); *cf.* Appeal Board No. 576866 (claimant was a citizen of the Dominican Republic, was not a refugee, asylee, or parolee, and had a restricted Social Security Card valid for work only with authorization from the Department of Homeland Security). It should also be noted that certain policies and regulations that allowed Cuban nationals who arrived in the US without a visa to apply for permanent residence were rescinded by the Department of Homeland Security on January 12, 2017, as a result of the resumption of diplomatic relations between the United States and Cuba.

claimant is deemed to be residing in the United States under color of law.[19] An interview with the U.S. Citizenship and Immigration Services (USCIS) in 2011 regarding an application for a relative immigrant visa petition first filed in 1986 resulted in a finding that the claimant was residing in the United States under color of law.[20] A claimant who arrived in the United States as a teenager in 1967 was also residing under color of law where he had been reporting to the Department of Homeland Security regularly beginning in 2007, advising DHS each time that he was working.[21]

A Jamaican citizen who had been annually issued a Form I-551 (temporary evidence of lawful admission for permanent residence with employment authorized) while removal proceedings were pending was able to establish a valid original claim.[22] However, a claimant who had only applied to register for permanent residence was unable to file a valid original claim based on work performed while he had no work authorization.[23]

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[19] 20 CFR § 416.1618 (a): "We will consider you to be permanently residing in the United States under color of law and you may be eligible for SSI benefits if you are an alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and that agency does not contemplate enforcing your departure. The Immigration and Naturalization Service does not contemplate enforcing your departure if it is the policy or practice of that agency not to enforce the departure of aliens in the same category or if from all the facts and circumstances in your case it appears that the Immigration and Naturalization Service is otherwise permitting you to reside in the United States indefinitely. We make these decisions by verifying your status with the Immigration and Naturalization Service following the rules contained in paragraphs (b) through (e) of this section."

[20] Appeal Board No. 590487 (claimant, a citizen of Poland, entered the US on a tourist visa in 1985; she married a US citizen in 1986, and applied for a relative immigrant visa petition with the Immigration and Naturalization Service (INS); the claimant was informed she would be told when her visa was granted. The claimant never received any communication regarding the status of her visa but continued living and working in the US, obtaining a social security card and filing and paying income taxes. The claimant was interviewed by USCIS (the successor to the INS) in 2011; the USCIS officer verified that her documents were authentic. The claimant received no further information or instructions following this interview, then filed a claim for benefits in March 2015).

[21] Appeal Board No. 591158.

[22] Appeal Board No. 573306 (removal proceedings were begun in 2005 but ended in 2012 and the claimant was restored to permanent resident status).

[23] Appeal Board No. 547211 (claimant, a residence of Mexico, worked as a cook for the same employer from 2005 until January 6, 2009 when he filed a claim for benefits; his work authorization had expired in October 2006. Claimant's application to register for permanent residence was denied in 2008, but the decision was later reversed and the application granted in February 2009; he obtained a new work authorization in March 2009).

2.19.5 TEMPORARY WORKERS

Foreign nationals who wish to work in the United States on a temporary basis must obtain a work visa. A foreign national without a valid work visa is not available for employment.[24] There are several categories of visas; the most common types of visas are the H-1B (Specialty Occupations and Fashion Models), the TN (NAFTA Professionals), and the O-1 (Individuals with Extraordinary Ability or Achievement). H-1B and TN visas are issued for a specific period of time, set forth on the visa, are limited to a specific employer, and are valid only while the foreign national is working for that employer. An H-1B visa is obtained through an application by the employer. Once the employment ends, the individual is not authorized to work for a new employer until a new visa has been obtained.[25] H-1B visas are obtained by the employer for which the claimant will be working and are no longer valid once the employment relationship ends. If the claimant obtains new employment, the new employer must obtain a new H-1B visa.[26]

A TN visa may be obtained on application by the employer or, for Canadian citizens, at a United States port of entry by providing proof of Canadian citizenship and a letter from the employer setting out details of the employment. Citizens of Mexico must apply for the TN visa at an embassy or consulate in Mexico, prior to arriving in the United States.[27] A TN visa holder whose employment has ended is not available for employment, even if a new TN visa could be obtained within a few hours of obtaining new employment.[28]

An O-1B visa is obtained on the petition of either the employer or by an individual acting as an agent, who may represent the employer, multiple employers, or the visa holder. If the visa was initially for one employer only, but new employment is obtained, it is not necessary to obtain a new visa. Rather, the agent advises USCIS that a new employer has been added.[29]

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[24] *Matter of Okumakpeyi*, 295 A.D.2d 828 (3d Dep't 2002).

[25] *Matter of Cale*, 46 A.D.2d 1065 (3d Dep't 2007).

[26] Appeal Board No. 540523 (claimant, a citizen of Syria, possessed an H-1B visa authorizing her to work for a financial company; she could seek new employment but would not be authorized to work until the new employer obtained a new visa); see, also, Appeal Board No. 544761.

[27] https://www.uscis.gov/working-united-states/temporary-workers/tn-nafta-professionals (last visited May 17, 2019).

[28] *Matter of Graif*, 250 A.D.2d 1012 (3d Dep't 1998); Appeal Board No. 507548.

[29] Appeal Board Nos. 568028-568032 and 568034 (claimant, a French national, was a choreographer and her activities while in the US included performances of her own work, teaching as an adjunct professor at two universities, collaborating on a book, and serving as liaison between the Metropolitan Opera Guild and the L'Opéra de Paris. Her visa was regularly extended, most recently (at the time of the hearing) through January 2013. She filed claims on several occasions between 2002 and 2011; the Board found her available for employment as her visa was

2.19.6 CERTIFICATIONS

Claimants who certify to being available for employment at a time when they are without authorization to work in the United States may have made a factually false statement, making any benefits received recoverable. A claimant whose employment has ended but whose H-1B visa has not expired is not expected to understand that, legally, she is considered unavailable for employment.[30] However, if the visa has expired, the claimant is aware that he or she is no longer authorized to work in the United States and a certification to being ready, willing, and able to work is a factually false statement.[31] Certifications under such circumstances may also constitute willful misrepresentations.[32]

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valid and she did not require a new visa to obtain new employment); *see also*, the "except" clause in Appeal Board No. 565271.

[30] Appeal Board No. 512529 (claimant, a citizen of Italy, had an H-1B visa valid from March 11, 2002, to January 3, 2003; she lost her employment on May 28, 2002, but believed she had sufficient time to find a new sponsoring employer. The claimant "cannot be held to understand our technical construction of the legal term of art of 'available' to encompass that a claimant must be immediately ready, willing and able to work without a legal barrier. The claimant's response on the claim that she was ready, willing and able to work is an erroneous conclusion of law and not a factually false statement.")

[31] Appeal Board No. 514088 (claimants work authorization card was valid through August 8, 2002, and carried an endorsement on the back that the claimant was only authorized to work while the card was valid; his certifications on his claim filed effective September 30, 2002 were factually false as the claimant knew his card had expired and he had applied for a new card).

[32] Appeal Board No. 521337 (claimant's work authorization expired in May 2002; claimant applied for a new authorization but had not received it at the time of the hearing in August 2004. The claimant's act in applying for a new authorization demonstrated his knowledge that he was not authorized after May 2002; his false certifications that he was ready, willing, and able to work were knowingly made).

Practice Tip:

Documents that may be needed to establish whether a claimant is authorized to work in the United States include the following:

- The claimant's social security card: Look for any endorsement stating that a separate work authorization is required.
- In a VOC case: Copies of documents that the claimant had provided to the employer for completion of the I-9, or for re-verification of the claimant's work authorization.
- A copy of any official statement from USCIS that it is aware of the claimant's presence in the United States, but no deportation proceedings are to be taken.
- In a case involving an O-1 visa, a copy of the petition filed by the claimant, the claimant's agent, or the employer.
- A copy of an application for asylum, refugee status, or parole.

Other factors that may be relevant include:

- Was the claimant being credited with earnings by the Social Security Administration?
- If the claimant's last date of employment is later that the expiration date on the work authorization document provided at the hearing, did the employer re-verify the claimant's authorization?