BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

In the Matter of	)	
	)	
VOJKAN TOSIC	)	OAH No. 21-1674-LUI
	)	Agency No. 20-1190

APPEAL DECISION

Docket Number: 20-1190 **Hearing Date:** July 20, 2021

CLAIMANT APPEARANCES: **DETS APPEARANCES:**

Vojkan Tosic None

CASE HISTORY

The claimant, Vojkan Tosic, timely appealed a June 30, 2020 determination that denied Unemployment Insurance (UI) benefits under AS 23.20. The Department of Labor referred the appeal to the Office of Administrative Hearings on June 25, 2021. Under the agreed terms of referral, an administrative law judge (ALJ) hears and decides the appeal under procedures specific to UI appeals. AS 44.64.060 procedures do not apply.

The matter was heard in a recorded hearing on July 20, 2021. Mr. Tosic provided testimony under oath.

The issue on appeal is whether Mr. Tosic was available for suitable work beginning May 10, 2020.

FINDINGS OF FACT

Mr. Tosic is a Serbian national who worked for an Akutan seafood processor, Trident Seafoods, under an H-2B visa starting January 6, 2020. The H-2B visa authorizes temporary, non-agricultural work for a specific employer.

In his claim, Mr. Tosic stated that he was laid off by Trident on May 11, 2020. Mr. Tosic explained at the hearing that there are different commercial fishing seasons, but he has been able to continue working between seasons because Trident would still have some work available. In 2020, Mr. Tosic planned to work from January to November, without leaving the country between fishing seasons. 2020 was different from other years, however. When the initial season ended in May, there was no work for Mr. Tosic. Trident allowed Mr. Tosic to remain in company-provided housing free

of charge, without any contract or other commitment to continue working the next season, set to start in June.

Mr. Tosic stated that there is no other employer in Akutan. He thought he could have left for a job elsewhere, but that there were fewer flights out of neighboring Dutch Harbor. He remained in Akutan hoping to get work from Trident.

Mr. Tosic stated that he looked for jobs in other states online, but did not register with an employment agency or apply for jobs. Mr. Tosic indicated that he understood his visa limited him to working for Trident and that he could get a visa to work for a different employer, but that there would not be time to do so in the few weeks he was laid off between fishing seasons.

Mr. Tosic resumed full time work for Trident on June 5, 2020.

A representative for Trident stated in a June 15, 2020 email, that it allowed workers to remain between fishing seasons "because of the fear of being unable to return to the US to work [the following] season if they went home." The representative further stated that "[t]hey were housed and fed although there was no work and there was no expectation of work."

Mr. Tosic applied for UI benefits, effective May 10, 2020. The Division determined on June 30, 2020 that Mr. Tosic was not eligible for UI benefits because he was not laid off due to COVID and his immigration status rendered him unavailable for full-time work. Mr. Tosic appealed on July 25, 2020.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

AS 23.20.378(a):

> (a) An insured worker is entitled to receive waiting-week credit or benefits for a week of unemployment if for that week the insured worker is able to work and available for suitable work.…

8 AAC 85.350:

> (a) A claimant is considered able to work if the claimant is physically and mentally capable of performing work under the usual conditions of employment in the claimant's principal occupation or other occupations for which the claimant is reasonably fitted by training and experience.
>
> (b) A claimant is considered available for suitable work for a week if the claimant
>
> > (1) registers for work as required under 8 AAC 85.351;

(2) makes independent efforts to find work as directed under 8 AAC 85.352 and 8 AAC 85.355;
(3) meets the requirements of 8 AAC 85.353 during periods of travel;
(4) meets the requirements of 8 AAC 85.356 while in training;
(5) is willing to accept and perform suitable work which the claimant does not have good cause to refuse;
(6) is available, for at least five working days in the week, to respond promptly to an offer of suitable work; and
(7) is available for a substantial amount of fulltime employment.

8 C.F.R. § 214.2(h)(23):

(23) Change of employers and extensions beyond 3 years during COVID–19 National Emergency for H–2B aliens essential to the U.S. food supply chain.

(i) This paragraph (h)(23) relates to certain H–2B workers providing temporary nonagricultural services or labor essential to the U.S. food supply chain.

(ii) A prospective new H–2B employer or U.S. agent who is seeking to employ an H–2B alien to provide temporary nonagricultural services or labor essential to the U.S. food supply chain under this paragraph (h)(23) may file an H–2B petition on Form I–129, accompanied by an approved temporary labor certification and attestation described in paragraph (h)(23)(v)(A) of this section, requesting an extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition for a period not to exceed the validity period of the temporary labor certification. Notwithstanding paragraph (h)(2)(i)(D) of this section, an alien in valid H–2B nonimmigrant status on or after March 1, 2020:

(A) Whose new petitioner files an H–2B petition on or after May 14, 2020, is authorized to begin employment with the new petitioner to perform work that is essential to the U.S. food supply chain after the petition described in this paragraph (h)(23), including the attestation described in paragraph (h)(23)(v)(A) of this section, is received by USCIS and before the H–2B petition is approved, but no earlier than the start date of employment indicated in the H–2B petition; or

(B) Whose new petitioner filed an H–2B petition on or after March 1, 2020 and the petition was pending on or after May 14, 2020, is authorized to begin employment with the new petitioner to perform work that is essential to the U.S. food supply chain after the attestation described in paragraph (h)(23)(v)(A) is received by USCIS and before the H–2B petition is approved.

(iii)

(A) With respect to a petition described in paragraph (h)(23)(ii)(A) of this section, and subject to the requirements of 8 CFR 274a.12(b)(27), the

new period of employment described in paragraph (h)(23)(ii) may last for up to 60 days beginning on the Received Date on Form I–797 (Notice of Action) or, if the start date of employment occurs after the I–797 Received Date, for a period of up to 60 days beginning on the start date of employment indicated in the H–2B petition. Employment is not authorized under this paragraph (h)(23) if USCIS does not receive the attestation described in paragraph (h)(23)(v)(A) of this section.

(B) With respect to a petition described in paragraph (h)(23)(ii)(B) of this section, the new period of employment described in paragraph (h)(23)(ii) may last for up to 60 days beginning on the date that USCIS acknowledges in writing the receipt of a properly filed attestation described paragraph (h)(23)(v). Employment under this paragraph (h)(23) is not authorized if USCIS does not receive the attestation described in paragraph (h)(23)(v)(A) of this section.

(C) With respect to either type of petition, if USCIS adjudicates the petition prior to the expiration of this 60–day period and denies the petition for extension of stay, or if the petition is withdrawn by the petitioner before the expiration of the 60–day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(27) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the petition is withdrawn. Nothing in this paragraph (h)(23) is intended to alter the availability of employment authorization related to professional H–2B athletes who are traded between organizations pursuant to paragraph (h)(6)(vii) of this section and 8 CFR 274a.12(b)(9).

(iv) Notwithstanding paragraphs (h)(13)(i)(B), (h)(13)(iv) and (v), and (h)(15)(ii)(C) of this section, an H–2B petition seeking an extension of stay for H–2B aliens who are essential to the U.S. food supply chain to work, and submitted with an approved temporary labor certification, may be approved on the basis of this paragraph (h)(23), even if any of the aliens requested in the H–2B petition have otherwise exhausted the applicable 3–year maximum period of stay in the United States and have not thereafter been absent from the United States for an uninterrupted period of 3 months, or if any such aliens would exceed the 3–year limit as a consequence of the approval of the extension.

(v) In addition to meeting all other requirements for the H–2B classification, to commence employment and be approved under this paragraph (h)(23):

(A) The H–2B petitioner must submit an attestation indicating that the H–2B alien will be performing work that is essential to the U.S. food supply chain;

(B) The alien must have been in valid H–2B nonimmigrant status on or after March 1, 2020; and

(C) The H–2B petition must have been—

(1) Received on or after March 1, 2020, and pending as of May 14, 2020, so long as the H–2B worker did not begin work with the new employer before May 14, 2020, or

(2) Received on or after May 14, 2020, but no later than September 11, 2020.

(vi) Authorization to initiate employment changes pursuant to paragraphs (h)(23)(ii) and (iii) of this section, or be approved for employment exceeding 3 years in duration pursuant to paragraph (h)(23)(iv) of this section, begins on May 14, 2020, and ends at the end of September 11, 2020.

Ch. 4, SLA 2020; Sec. 1, Enrolled HB 308 (signed into law March 26, 2020):

Section 1. The uncodified law of the State of Alaska is amended by adding a new section to read:

UNEMPLOYMENT INSURANCE: BENEFIT QUALIFICATION AND WAITING WEEK DURING NOVEL CORONAVIRUS DISEASE OUTBREAK.

(a) To the extent consistent with federal law, an insured worker who is otherwise qualified to receive a benefit under AS 23.20 (Alaska Employment Security Act) may not be disqualified for failure to comply with AS 23.20.378(a) because of conduct by the insured worker or the employer of the insured worker related to an outbreak of novel coronavirus disease (COVID-19), including conduct involving

(1) providing care, including medical care, to one or more persons;

(2) preventing or limiting the spread of COVID-19; or

(3) preventing or limiting economic loss or harm.

(b) The protection of an insured worker under (a) of this section applies for a period of 120 days beginning on the effective date of this section or the date the insured worker applies for a benefit under AS 23.20, whichever is later.

(c) For the duration of a state or national emergency for an outbreak of novel coronavirus disease (COVID-19), the limitations under AS 23.20.375(b) do not apply to benefits payable to an insured worker under AS 23.20 (Alaska Employment Security Act) who is otherwise entitled to receive waiting-week credit or benefits under AS 23.20.375(a).

(d) The provision of a benefit as permitted by this section is not a violation of AS 23.20.500.

(e) The commissioner of labor and workforce development shall administer this section as required under AS 23.20.005(b) and 23.20.095.

(f) In this section, "insured worker" has the meaning given in AS 23.20.520.

APPLICATION

To be eligible for unemployment benefits for a given week, the claimant must be "available for suitable work" during that week. AS 23.20.378(a). Among other requirements, a claimant must make efforts to find work and be willing to accept and perform suitable work to be considered "available." 8 AAC 82.350(b)(2), (5).

Mr. Tosic expressed a willingness and desire to work after he was laid off by Trident. But as an H-2B visa holder, Mr. Tosic's willingness was limited by his legal ability to work.

H-2B visas authorize work for a specific employer. 8 C.F.R. § 214.2(h)(2)(i). For an H-2B visa holder to change employers, the United States Citizenship and Immigration Services ("USCIS") must first issue a new visa for that employer. 8 C.F.R. § 214.2(h)(2)(i)(D). As a condition of entering the country on a non-immigrant visa like the H-2B, visa holders agree to leave the United States when the visa expires, or employment terminates. 8 C.F.R. § 214.1(a)(3)(ii). Because of this restriction, H-2B holders would generally not be in the United States long enough following a layoff to apply for UI benefits. Other types of visa holders can remain for a limited grace period. 8 C.F.R. § 214.1(i). To the extent a laid off visa holder is able to remain in the United States, however, the Department of Labor has long considered them to be unavailable for work if their visa is limited to the employer who laid them off. *See* Department of Labor Benefit Policy Manual at AA 70-2 (foreign national with employer-specific restriction is not available for work, citing 2006 adjudication) (available at https://labor.alaska.gov/unemployment/bpm/Able_Available.pdf).

Two laws adopted in response to the COVID-19 pandemic potentially impacted the status quo for H-2B visa holders. First, USCIS adopted a temporary rule allowing an H-2B visa holder to change jobs and begin work for a new employer while a new visa application is still pending. 8 C.F.R. § 214.2(h)(23)(ii). This rule had a very limited time period, allowing pre-authorization work between May 14, 2020 and September 11, 2020. 8 C.F.R. § 214.2(h)(23)(v)(C).

Second, the Alaska Legislature passed HB308 which amended the uncodified law to state that an insured worker will not be considered unavailable for suitable work if they are not working because of COVID-19, including (1) to provide care to someone with COVID-19; (2) to prevent or limit the spread of COVID-19; or (3) to prevent or limit economic loss or harm related to COVID-19. This too has a limited time period, applying only after March 1, 2020 and for a period of 120 days after the later of (1) March 26, 2020; or (2) the date a worker applies for unemployment.

When Mr. Tosic was laid off on May 11, 2020, he no longer had work authorization under his H-2B visa and would normally need to leave the United States. The specific authority for Trident to keep its laid off visa holders in the United States is unclear

from the record. Regardless, Mr. Tosic remained and was unemployed until June 5, 2020 when he resumed work for Trident for the next season.

OAH, on delegation from the Department of Labor Commissioner, recently considered similar circumstances in *In re Ruslan Kravchuk* OAH No. 20-0911-ETS (Labor and Workforce Development 2021). In that case, Mr. Kravchuk, an H-2B visa holder applied for UI benefits after being laid off between commercial fishing seasons during spring 2020. OAH concluded that Mr. Kravchuk was not "available" for work prior to May 14, 2020, when the temporary H-2B rule went into effect. *Id.* at 6. OAH also determined that Mr. Kravchuk was ineligible after May 14, 2020 because he mistakenly believed he could not accept work from other employers and therefore did not "make himself available" for other work. *Id.* at 6-7.

When Mr. Tosic applied for UI benefits on May 10, 2020, his H-2B visa authorized him only to work for Trident, which laid him off the following day. The law at the time prohibited him from working for another employer until USCIS issued a new visa for that employer. Thus, like Mr. Kravchuk, Mr. Tosic was unavailable to work at that time.

For the short period between May 14, 2020 (when the law temporarily changed) and June 5 (when Mr. Tosic started work for the next fishing season), Mr. Tosic might have made himself available for other work under a pending visa application. But Mr. Tosic indicated that in the limited time between seasons, he did not believe there was time to obtain a visa to work for a different employer. He remained in Akutan in hopes of available hours with Trident and did not pursue other options. Similar to Mr. Kravchuk, therefore, Mr. Tosic did not make himself available for other work.

Mr. Tosic did state that he looked for jobs online, but did not register or apply for any jobs. To be considered available to work, 8 AAC 85.350(b) requires a claimant to register for work. This requirement can be waived if a claimant is temporarily unemployed with a definite date to return to full-time work. 8 AAC 85.351(g). But as Mr. Tosic testified, he was not under contract with Trident at the time. A Trident representative also stated that workers remaining between seasons had no guarantee for future work. Thus Mr. Tosic did not have a definite return date. Because Mr. Tosic did not register for work, he cannot be considered available to work during this time period.

The other new 2020 law, HB308, does not help Mr. Tosic either. The law provides some eligibility for workers who were unable to work because of COVID-19. Mr. Tosic speculated that there was less fishing due to COVID-19, which led to the lack of work between seasons. Trident confirmed, however, that it laid off workers between seasons because of lack of work. COVID-19 certainly impacted the fishing industry in many ways, but it was not the reason the season ended or Trident laid off Mr. Tosic. Thus HB308 does not apply.

DECISION

The June 30, 2020 determination denying UI benefits is **AFFIRMED.**

DATED July 21, 2021.

[redacted]
Rebecca Kruse
Administrative Law Judge

APPEAL RIGHTS

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party's control. A statement of rights and procedures is enclosed.

CERTIFICATE OF SERVICE

I certify that on July 21, 2021, this document was sent to: Vojkan Tosic (by mail and email); UICC Team, Representative (by email); UI Technical Team (by email). A courtesy copy has been emailed to the DETS UI Appeals Team.

[redacted]
Office of Administrative Hearings