

MISCELLANEOUS: 70
Citizenship or Residence
Requirements.

DECISION OF COMMISSION

In the Matter of:

Aderonke A. Ariyo
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Date of Appeal

to Commission: July 20, 1993

Date of Review: August 25, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 43022-C

Date of Mailing: September 2, 1993

Final Date to File Appeal

with Circuit Court: September 22, 1993

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9309565, mailed July 2, 1993.

ISSUE

While performing services for an employer during the base period of her claim, was the claimant lawfully admitted for permanent residence, lawfully present in the United States for the purpose of performing such services, or was she permanently and lawfully residing in the United States under color of law at the time such services were performed, while providing the appropriate documentation to the Commission in accordance with the provisions of Section 60.2-617 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which affirmed a reprocessed monetary determination and declared her monetarily ineligible to receive unemployment compensation because she had no wages in covered employment during the base period of her claim filed effective July 28, 1991.

In fact, the claimant had worked for the Crystal City Play and Learn Day Care Center in Arlington, Virginia, during at least three

quarters of her base period, earning a total of \$8,790.74. Commission records reflect that she certified for and was paid benefits on her claim. Nevertheless, her base period wages were deleted in the reprocessed monetary determination after questions arose concerning her employment status during the time she had worked.

The claimant is a Nigerian citizen who initially came to the United States in 1977 to attend Gallaudet College in Washington, D.C., where she received a bachelor's degree in 1984. She then entered American University in January, 1985, and took classes there until sometime in 1986.

The claimant's replacement form I-94 issued by the U. S. Immigration and Naturalization Service (INS) has the notation "D/S" in the space where her latest departure date is supposed to be listed. It was established at the hearing that this means "duration of studies" as applied to students. The claimant was also authorized to obtain practical training employment. This apparently caused a problem with respect to a determination of her claim status because the report from the Immigration and Naturalization Service concerning her status came back with an "X" in the block next to the statement "This document relates to an alien authorized employment." Nevertheless, it stated on the same and following lines that the employment authorized was only part-time practical training not to exceed 20 hours per week between June 30, 1984, and December 30, 1984. The receipt date stamp of September 5, 1991, was placed over a portion of this response which has the effect of separating it into two parts.

Even though she had stopped attending school, the claimant continued to reside in the Washington, D.C. area. She decided she would like to have a job and made some attempts through a friend to obtain permission to work from the INS. She was under the impression that if she found an employer willing to hire her, it would be a simple matter to obtain authorization to work.

Sometime in 1989, the claimant did obtain employment at the Crystal City Play and Learn Center in Arlington, Virginia. She admitted to the employer when she went there that she did not have a work permit; however, she was able to present a valid Maryland driver's license together with her social security card which contained no indication stamped on its face that the holder was not authorized to work. Accordingly, she was hired as a child care attendant.

In the meantime, the claimant found that the process of obtaining authorization to work from INS was extremely complicated; therefore, she sought legal advice. Her attorney then began the long and arduous process of attempting to legalize her position in the job she already held. Before this process could be completed, the claimant was terminated; therefore, the process stopped. Based upon the evidence submitted at the Appeals Examiner's hearing, it appears that a final

determination had been rendered which accepted the claimant's application for processing; however, it was never processed to authorize her to work the job she had held.

Since becoming unemployed, the claimant has not become a naturalized citizen. Additionally, she has never applied for political asylum. The Commission takes official notice that Nigeria is located in central Africa and is not part of the Middle East as defined in Title 8 of the U. S. Code, Section 1153(a)(7). The claimant presented no evidence to indicate that she was a "parole alien" under the provisions of 8 U. S. C. 1182(d)(5).

OPINION

Section 60.2-617 of the Code of Virginia provides:

- A. Benefits shall not be paid on the basis of services performed by an alien unless such individual was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently and lawfully residing in the United States under color of law at the time such services were performed. The provisions of this subsection shall include aliens who were lawfully present in the United States as a result of the application of the provisions of Section 1153 (a)(7) or Section 1182 (d)(5) of the Immigration and Nationality Act (8 U.S.C. Section 1101 et seq.). Additionally, any modifications to the provisions of Section 3304 (a)(14) of the Federal Unemployment Tax Act (26 U.S.C. Section 3301 et seq.) which specify other conditions or other effective dates than stated herein for the denial of benefits based on services performed by aliens and which modifications are required to be implemented under state law as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, shall be deemed applicable under the provisions of this section.
- B. Any data or information required of individuals claiming benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits.

- C. In the case of an individual whose claim for benefits would otherwise be approved, no determination that benefits to such individual are not payable because of his alien status shall be made except upon a preponderance of the evidence.

The practical effect of this section of the Code is to delete any wages earned by an alien if a preponderance of the evidence establishes that the individual was not lawfully admitted for permanent residence at the time such services were performed, was not lawfully present for the purpose of performing such services, or was not permanently and lawfully residing in the United States under color of law at the time such services were performed. It is also apparent that the problem with the status of the claimant in the case at hand was not immediately evident due to administrative error. Apparently, someone read the INS response form as indicating that the claimant was an alien authorized to work in the United States without realizing that this was an authorization limited to 20 hours per week for six months of practical training in 1984. Obviously, this did not extend into the base period of her claim which ran between April 1, 1990, and March 31, 1991.

This claimant was admitted to the United States on a student visa which was due to expire when she ended her studies. Inasmuch as this occurred in 1986, it is apparent that at the time she worked in Arlington at the Crystal City Play and Learn Center, she was not lawfully admitted for permanent residence in the United States.

Additionally, the claimant was not lawfully present for the purpose of performing such services during her base period. This particular provision of the Code would be most applicable in the case of alien workers who come to the United States to perform specific jobs which are being held open for them. This is the status the claimant would have held if the application which was being processed at the time of her separation from work had become finally approved. Since it never was approved, it is apparent that the claimant fails to meet this requirement as well.

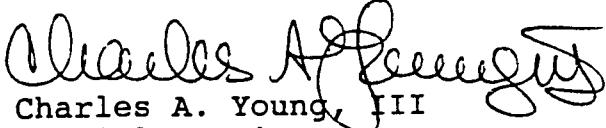
The argument made on behalf of the claimant essentially goes to the third criteria, making the contention that she was residing in the United States permanently and lawfully under color of law at the time she performed such services. The Commission must disagree. At the time the claimant was working, she was in the United States on a student visa which should have expired in 1986 when she stopped being a student. She has not shown that she was a "parole alien." She did not occupy special status as a refugee from the Middle East, and she had not sought political asylum during the time she was working. Most importantly, her own testimony effectively disproves that she reasonably believed she was residing in the United States permanently under color of law when she admitted to informing an official at the

Crystal City Play and Learn Center that she was not authorized to work. The fact that she was allowed to do so anyway could well present a problem for that employer, inasmuch as the reliance upon her Maryland driver's license and social security card may no longer insulate it from liability for hiring an illegal alien under the applicable law. Nevertheless, the applicable law to be considered in this case is that governing a claim for unemployment compensation in the Commonwealth of Virginia. Inasmuch as a preponderance of the evidence does not establish that this claimant has met any of the three criteria for being a legal worker during the base period of her claim, any wages earned cannot be considered in establishing her monetary eligibility.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

It is held that the claimant is monetarily ineligible for benefits based upon her claim filed effective July 28, 1991.


Charles A. Young, III
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT. (SEE NOTICE ATTACHED)