



IMMIGRATION ALERT!

INS Nonimmigrant in TN status may receive unemployment benefits in Washington State

The State of Washington's Office of Administrative Hearings for the Employment Security Department recently ruled that a foreign national in TN status could receive state unemployment benefits for the period of time between being laid-off and then rehired by a U.S. employer. (Matter of Carpenter, File No. 02/2001-20863.)

This ruling is contrary to established state case law, which denies unemployment benefits to foreign nationals in nonimmigrant status such as E-1/E-2, H-1B, L-1, or TN. The prevailing policy is to deny this benefit to non-immigrants based upon state guidelines, which require a recipient to be "available" to start new employment. Because most forms of temporary U.S. work authorization are employer specific, a nonimmigrant must file a new petition with the U.S. Immigration and Naturalization Service in order to begin employment with a new employer. This filing requirement and the associated delay in being eligible to begin work with a new employer prevents the foreign national from being "available" and thus eligible for unemployment benefits.

The administrative judge in the Washington case reasoned that a foreign national in TN status is sufficiently "available" for a new position due to the fact that acquiring work-authorized TN status under a new employer is a relatively speedy process. For Canadian citizens, acquiring TN status may be accomplished by an in-person application filed at a U.S. port of entry; the application is usually approved the same day. This is very different from other nonimmigrant categories, such as H-1B and L-1, which usually require a new petition to be filed with the U.S. Immigration and Naturalization Service before new employment can begin. Such filings can take months to be approved.

Please keep in mind that this new ruling applies only to foreign nationals in TN status who reside in the State of Washington. It is highly unlikely that other states or the federal government will broaden eligibility for unemployment benefits in a similar fashion given the current trend to tighten government benefits offered to foreign nationals and U.S. citizens alike.

Seyfarth Shaw will continue to monitor developments in this area and will keep clients informed of any significant changes in the law.

