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DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 1-86

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : *Barbara Ann Farmer*
 BARBARA ANN FARMER
 Acting Administrator
 for Regional Management

SUBJECT : Eligibility of Aliens for Unemployment
 Compensation Under Section 3304(a)(14)(A), FUTA

1. Purpose. To clarify the Department of Labor's interpretation of Section 3304(a)(14)(A) of the Federal Unemployment Tax Act (FUTA) regarding the eligibility of aliens for unemployment compensation.

2. References. Section 3304(a)(14)(A), FUTA; UIPL 6-83; UIPL 15-78; FM 18-83; GAL 43-80; Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566 (including Supplement #3, Questions and Answers, issued May 6, 1977).

3. Background. Section 3304(a)(14)(A), FUTA, requires, as a condition for the Secretary of Labor's certification of a State to the Secretary of the Treasury, that the State law provide that:

compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who 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 residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act).

To be eligible for unemployment compensation under this section of FUTA, an alien must fall within one of the three categories specified in the law at the time the work on which the claim is based was performed. In addition, the individual must be legally available for work at the time benefits are claimed.

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Department of Labor guidelines on this subject have advised States to rely on information or documents presented by aliens to determine whether they qualify under any of these three categories. States have also been advised to consult the Immigration and Naturalization Service (INS) when necessary to resolve questions of an alien's status or entitlement to work in the United States.

In the case of the first two categories, the alien can usually provide one of several documents which confirm his or her right to work. GAL No. 43-80 and Supplement #3 of the Draft Language and Commentary to Implement the Unemployment Amendments of 1976-P.L. 94-566 describe the most common acceptable documents.

It has been more difficult for State agencies to implement a uniform policy regarding the third category, aliens who claim unemployment benefits based on permanent residence under color of law. Generally, States have followed INS guidelines in determining whether an alien meets this criterion. However, neither FUTA nor immigration law specifically define the terms "permanently residing" or "under color of law." In addition, there have been conflicting court and appeals board decisions on this issue. In some cases, State agency decisions have been overturned and agencies have requested Department of Labor guidance regarding how to proceed in future cases.

The purpose of this program letter is to ensure that Section 3304(a)(14)(A), FUTA, is uniformly interpreted and applied. Some of the information provided below has also been issued in earlier directives and where this occurs references are provided. The information is provided again in this program letter for continuity in the interpretation of the Federal statute.

4. Interpretation. Under Section 3304(a)(14)(A), FUTA, compensation generally is not payable on the basis of service performed by an alien. However, three categories of aliens are exempt from the denial of benefits due to alien status:

- o Aliens lawfully admitted for permanent residence at the time the services were performed.
- o Aliens lawfully present for purposes of performing the services.
- o Aliens permanently residing in the United States under color of law at the time the services were performed.

Following is an interpretation of Section 3304(a)(14)(A), FUTA, as it applies to aliens in general, as well as an interpretation of each of the three exemptions in the law.

a. General Monetary Entitlement and Eligibility Requirements. Section 3304(a)(14)(A), FUTA, exempts certain classes of aliens from denial of unemployment compensation due to their alien status. However, the alien must also meet State eligibility requirements applicable to all claimants. Two such eligibility requirements which all aliens must meet are summarized below. Any issues involving either of these requirements must be resolved through a nonmonetary determination before authorizing payment of benefits. Guidelines for adjudicating these issues are provided in UIPL No. 15-78.

(1) Allowable Wage Credits/Monetary Entitlement. The wage credits used to establish a claim and monetary entitlement to benefits must be earned while an alien is legally authorized to work in the United States. For example, if an alien enters the country illegally and later becomes an immigrant or permanent resident under color of law, only services performed after legal status is established may be used to support a claim.

(2) "Able and Available" Requirement. Under the laws of all States, a claimant must be "able and available" to work to be eligible for unemployment compensation. In addition to meeting other State availability requirements, an alien must be legally authorized to work in the United States to be considered "available for work." Therefore, an alien without current, valid authorization to work from the INS is not legally available for work and not eligible for benefits.

Availability for work while claiming benefits is a separate issue from the alien's status while working during the base period. For example, an alien may have been authorized to work at the time services were performed, but not authorized to work when he or she files a claim for benefits. Or an alien's work authorization may expire while he or she is in active claim status. In these cases, the alien's wage credits could be used to establish a claim, but the alien would not be eligible for benefits because he or she is not available for work. Current, valid authorization to work is necessary for an alien to be considered "available for work."

b. Lawfully Admitted for Permanent Residence. The term "lawful permanent resident" is defined in the

Immigration and Nationality Act. It includes aliens who have been lawfully admitted to the United States as "immigrants" and those whose status has been adjusted from that of "nonimmigrant." 8 U.S.C. 1101(a)(20). Evidence of this status is the Alien Registration Receipt Card (Form I-151 or I-551), commonly called a "green card," issued to each lawful permanent resident by the INS.

Any wage credits earned in covered employment while a prospective claimant is a lawful permanent resident can be used to establish a claim for benefits. In addition, lawful permanent residents who are otherwise eligible for benefits under State law would meet the availability requirement (authorization to work in the United States) needed to be eligible for benefits.

c. Lawfully Present for Purposes of Performing Services. This category is not defined in the Immigration and Nationality Act. However, based on the language of the statute and its legislative history, three groups of aliens are included in this category: Canadian and Mexican alien commuters authorized to work in the United States, nonimmigrants granted a status by the INS authorizing them to work in the United States, and other aliens with INS authorization to work in the United States regardless of their status. Section 3304(a)(14)(A), FUTA, is interpreted to apply to these three groups as follows.

(1) Commuters. This group includes aliens who live in Canada and Mexico and commute daily or seasonally to work in the United States. In some respects commuters are treated as "lawful permanent residents" in that they are issued green cards by the INS. These commuters have the right to reside permanently in the United States but choose not to exercise that right. Commuters must be distinguished from other Canadian and Mexican aliens who enter the United States for limited periods. Short term visitors may be issued nonresident alien border crossing cards, known as a "white cards." These cards do not include authorization to work. Various types of white cards are discussed in Supplement #3 of the Draft Language and Commentary to Implement the Unemployment Amendments of 1976-P.L. 94-566.

(2) Nonimmigrants whose status authorizes them to work. This group includes aliens legally admitted to the United States as nonimmigrants (i.e., temporary visitors) and whose status authorizes them to work during their stay. These are aliens admitted to the United States as temporary workers or trainees (H-1, H-2, or H-3) after the Secretary

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of Labor has certified that their admission will not have an "adverse affect" on domestic workers. These aliens will be issued documents by the INS indicating the kinds of work they are allowed to perform and how long they can remain in the United States. In most cases, a failure by the alien to maintain certified employment results in a corresponding failure to maintain status in this category. Therefore, if the alien becomes unemployed, he or she would probably not meet the legal availability requirement for entitlement to benefits.

(3) Other aliens with INS authorization to work. This group includes other aliens who are permitted to work by the INS regardless of their status in the United States. The INS has broad discretionary authority to permit an alien to work "for humanitarian reasons" pending determination of the alien's status. Beneficiaries of this discretion may range from applicants for asylum or suspension of deportation to deportable or excludable aliens. To be included in this group, the alien must have specific documentation from the INS indicating he or she is authorized to work. The authorization may be for a specific time only or may be for an indefinite period. Aliens in this group must be distinguished from those who are permanently residing in the United States under color of law (discussed under Item d.(3) below).

As long as an alien in one of the above three groups is authorized by the INS to work in the United States, he or she is "lawfully present for purposes of performing such services." Therefore, any wage credits earned in covered employment may be used to establish a claim for benefits. However, the alien must also be currently authorized to work in the United States while claiming benefits.

Because the status of aliens in this category can depend on many factors and also may be subject to change, each case must be reviewed carefully by the State agency to determine the alien's status both at the time of work and the time benefits are claimed. There is one exception to this legal availability requirement: Canadian nationals claiming benefits against a State of the United States under the Interstate Benefit Payment Plan must satisfy only Canadian availability requirements if they reside in Canada.

d. Permanently Residing in the United States Under Color of Law. The third category of individuals exempt from denial of benefits due to alien status are aliens who were "permanently residing in the United States under color of law" when the services on which the claim is based were performed. FUTA does not define the term "under color of

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law," nor is this term defined in the Immigration and Nationality Act. However, Section 3304(a)(14)(A), FUTA, does identify two groups of aliens who are included in this category. These aliens are usually referred to as refugees and parolees. In addition, this category is interpreted to include aliens "presumed to have been lawfully admitted for permanent residence" and certain aliens whom the INS has determined may remain in the United States for an indefinite period. These groups are discussed below.

(1) Refugees/Parolees. FUTA specifically includes in the category of "permanently residing under color of law" those aliens who are lawfully present in the United States under the provisions of Section 203(a)(7) or Section 212(d)(5) of the Immigration and Nationality Act. Section 203(a)(7) involves the general INS authority to admit refugees, while Section 212(d)(5) deals with aliens temporarily paroled into the United States. Aliens admitted to the United States under these provisions are entitled to work for specific periods indicated on the forms issued to them by the INS. These groups of aliens and the documents they are issued are discussed in Supplement #3 of the Draft Language and Commentary to Implement the Unemployment Amendments of 1976-P.L. 94-566.

(2) Aliens presumed to be lawfully admitted for permanent residence. Under immigration law, several other groups of aliens are presumed to have been lawfully admitted for permanent residence even though their actual admission to the United States is undocumented. 8 C.F.R. Part 101. These aliens are considered exempt from the denial of unemployment compensation as aliens "lawfully admitted for permanent residence" described in item 4 b above. A list of these groups and the documents that are issued to them by INS is provided in Supplement #3 of the Draft Language and Commentary to Implement the Unemployment Amendments of 1976-P.L. 94-566.

(3) Other aliens permanently residing under color of law. This group includes those aliens who, after review of their particular circumstances under INS statutory or regulatory procedures, have been granted a status which allows them to remain in the United States for an indefinite period of time. This interpretation is consistent with the language and legislative history of the FUTA provision and related case law.

Congress has enacted a complex set of statutes on immigration and has created the INS as an agency with broad powers, both regulatory and adjudicatory. Under the Immigration and Nationality Act and its implementing

regulations, the INS determines the status of each alien in the United States. In addition, the Supreme Court recently confirmed the discretionary authority of the INS in alien matters. 1/ Therefore, in making a determination about an alien's status, the INS is acting "under color of law." A case which illustrates this point is Holley v. Lavine. 2/ In Holley, the INS sent a letter informing a Canadian citizen with six United States citizen children that she would not be deported at least until her children were grown. This discretionary act by the INS gave "color of law" to her status as a resident of the United States.

For informal INS action to authorize an alien's residence under "color of law", the INS must know of the alien's presence, and must provide the alien with official assurance that enforcement of deportation is not planned. If the INS issues a letter or other document to the alien stating that departure will not be enforced, the alien is present under color of law.

In addition to the term "color of law," FUTA includes the term "permanently residing." This term is not defined in FUTA; however, the term "permanent" is defined in the Immigration and Nationality Act, 8 U.S.C. Section 1101(a)(31), as follows:

The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with the law.

The Immigration and Nationality Act also defines the term "residence" as "the place of general abode," which is the "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. Section 1101(a)(38). Therefore, an individual actually living in the United States who receives assurance from the INS that departure will not be enforced is "permanently residing" in the United States within the meaning of Section 3304(a)(14)(A), FUTA.

1/ Immigration and Naturalization Service v. Rios-Pineda, U.S. , 105 S.Ct. 2098 (1985)

2/ 553 F.2d 845 (2d Cir. 1977), cert. denied, 435 U.S. 947 (1978)

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Any wage credits earned by the individual in covered employment while the individual is "permanently residing in the United States under color of law" may be used to establish a claim for benefits. However, if an alien enters the country illegally and later becomes a permanent resident under color of law, only services performed after the later date may be used to establish a claim. In addition, the individual must be legally authorized to work in the United States when the claim is filed and during any claim series to be legally available for work.

The issue of whether an alien is permanently residing in the United States under color of law has been the subject of recent State appeals board and court decisions. Usually these cases concern aliens who entered the United States illegally, or who were lawfully admitted to the United States but not authorized to work during their stay. Later the alien may apply to the INS for permanent residence, political asylum, suspension of deportation or some other change in status. While a status determination is pending or deportation proceedings are being considered, the alien may file a claim for unemployment compensation. In some (but not all) of these cases, appeals boards or courts have ruled that if the INS knows of an alien's illegal presence in the United States and has taken no action on the case, the alien is "permanently residing in the United States under color of law."

Rulings of this type do not conform with the intent of Section 3304(a)(14)(A), FUTA, or its legislative history. INS inaction is not sufficient to show that an alien is present under color of law and States may not interpret it as such. Unless the INS has affirmatively exercised its discretion against deportation or authorized the alien to work, the alien is not entitled to work and cannot be considered available for work. Therefore, the alien could not meet the two general eligibility requirements discussed in Item 4.a above.

This interpretation is in accord with the legislative history of Section 3304(a)(14)(A), FUTA, which reflects that Congress did not intend State agencies to administer immigration law. 122 Cong. Rec. 33284-87 (1976) (Statement of Sen. Cranston). If INS inaction could validate an alien's claim that he or

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she was permanently residing in the United States under color of law, State agencies would need to learn and apply the intricacies of INS enforcement procedure. State agencies would also have to determine the legal question of the length of delay needed to show INS acquiescence to the alien's presence in the United States.

Moreover, without affirmative action by the INS, any alien, regardless of the legality of entry, could become eligible to receive unemployment compensation simply by filing an application for permanent residence or suspension of deportation. Congress has indicated no intent to include such persons under the provisions of Section 3304(a)(14)(A), FUTA. In short, the filing of an application alone cannot change an alien's resident status. The INS must affirmatively determine each alien's status in accordance with its authority and the alien's specific circumstances.

The cases discussed here differ from those where the INS has granted an alien permission to work pending deportation or a determination of the alien's status. If the INS grants an alien permission to work, the alien's status changes to that of "lawfully present for the purposes of performing such services." This category is discussed under Item 4 c (3) above. This interpretation is also in line with Congress' intent that State agencies not administer immigration law. State agencies may only determine whether an alien was entitled to work at the time his or her wage credits were earned, and whether the alien is legally available for work while claiming benefits.

5. Action Required. All State laws currently provide for the payment of unemployment compensation to aliens under the terms specified by Section 3304(a)(14)(A), FUTA. Therefore, no amendments to State law are necessary for States to remain in conformity with these FUTA requirements unless State or Federal courts construe the State law in a manner inconsistent with the Department's interpretation of Section 3304(a)(14)(A). State administrators are requested to take necessary action to assure that the State law continues to be applied consistently with Section 3304(a)(14)(A), FUTA, as interpreted in this letter.

6. Inquiries. Please direct questions to the appropriate regional office.

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