

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0091-R

*EAB Decision 2015-EAB-0091 Adhered To On Reconsideration
Eligible*

PROCEDURAL HISTORY: On December 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant failed to file his claim in accordance with Department regulations (decision # 143012). Claimant filed a timely request for hearing. On January 20, 2014, ALJ Murdock conducted a hearing, and on January 21, 2014, issued Hearing Decision 15-UI-32147, affirming the administrative decision. On February 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On February 12, 2015, EAB issued Appeals Board Decision 2015-EAB-0091, reversing Hearing Decision 15-UI-32147. On April 10, 2015, the Department filed a request for reconsideration.

Under OAR 471-041-0145(1) (October 29, 2006), a party may request reconsideration of an EAB decision “to correct an error of material fact or law, or to explain any unexplained inconsistency with Employment Department rule, or officially stated Employment Department position, or prior Employment Department practice.” Any such request for reconsideration is subject to dismissal unless it is filed “on or before the 20th day after the decision sought to be reconsidered is mailed.” OAR 471-041-0145(2). The Department’s request is therefore subject to dismissal because it was not timely filed. Under ORS 657.290(3), however, EAB may exercise its discretion and at any time reconsider its decision. We choose to exercise this discretion and grant reconsideration of Appeals Board Decision 2015-EAB-0091 to address certain issues raised by the Department’s request.

In Appeals Board Decision 2015-EAB-0091, we concluded that the Department erred when it held that claimant failed to file his claim in accordance with Department regulations. The Department found that claimant, a citizen of the Federated States of Micronesia (FSM), failed to demonstrate his eligibility to work lawfully in the United States because he did not provide the Department with a copy of his unexpired passport and I-94, a document issued to non-United States citizens when they enter this country. We found that claimant complied with Department regulations and provided adequate proof of authorization lawfully to work in the United States under 8 USC § 1324(b)(1) when he gave the Department a copy of an unrestricted social security card and an identification card issued by the state of Oregon.

In its request for reconsideration, the Department contended that EAB's conclusion – that the Department improperly refused to accept the documents claimant submitted as proof of employment eligibility – was erroneous. In support of its position, the Department noted that pursuant to guidance provided by the U.S. Department of Labor, it relied upon information in a February 13, 2008 “Fact Sheet” issued by the U.S. Citizenship and Immigration Services (USCIS)¹ to verify the employment eligibility of FSM citizens. The Department stated that “[t]he ‘Fact Sheet’ provides that upon admission, the [FSM] citizens will receive a Form I-94 and further provides the I-94 along with a valid passport establish employment authorization in the U.S.” According to the Department, it has a “longstanding policy” of requiring that FSM citizens provide these two documents as proof of employment authorization.

Although the “Fact Sheet” to which the Department refers states that a Form I-94 and unexpired FSM passport “shall establish identity and employment authorization for the purposes of employment verification (the Form I-9),” it also states that “[a]ll other requirements and procedures relating to the Form I-9 and the employer sanction laws” apply to FSM citizens. EAB Exhibit 1 at 4. The instructions that accompany the Form I-9 include a list of documents that are acceptable to demonstrate employment eligibility. In accordance with these instructions, a state issued identification card and a social security card that contains no employment restrictions are adequate proof that an individual is authorized to work lawfully in the United States. EAB Exhibit 2 at 9. USCIS guidance that is more current than the “Fact Sheet” upon which the Department relied specifically notes the applicability of these instructions to FSM citizens: a November 29, 2011 USCIS document states that a driver's license and unrestricted Social Security card are acceptable proofs of employment authorization for FSM citizens, and cautions employers that it must permit employees to choose what documents they wish to submit as proof of their employment eligibility. Exhibit 3 at 1.

Based on our analysis of the applicable law, we therefore hold that we made no mistake of fact or law when we concluded that the Department cannot require that an individual, even one subject to the special provisions applicable to FSM citizens, produce certain specific documents as proof of employment eligibility. Any “long standing [Department] policy” of accepting *only* an unexpired passport and Form I-94 as proof of a FSM citizen's employment authorization is contrary to the law.²

DECISION: The Department's request for reconsideration is granted. On reconsideration, we adhere to Appeals Board Decision 2015-EAB-0091.

Susan Rossiter, Tony Corcoran and J.S. Cromwell

¹ The following documents are marked as EAB exhibits: a 02/13/2008 USCIS “Fact Sheet” is marked as EAB Exhibit 1; a copy of the Form I-9 and instructions is marked as EAB Exhibit 2; and an 11/29/2011 USCIS document is marked as EAB Exhibit 3. Copies of these exhibits are included with this decision. Any party that objects to the admission of EAB Exhibits 1 through 3 must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, EAB Exhibits 1-3 will remain part of the record.

² As we noted in Appeals Board Decision 2015-EAB-0091, 8 USC § 132b provides that an employer or other entity may not require that an individual present a particular form of documentation to demonstrate employment eligibility; doing so may violate the anti-discrimination provisions of the Immigration and Nationality Act.

DATE of Service: April 28, 2015

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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