EO: 200 BYE: 202146

State of Oregon **Employment Appeals Board** 875 Union St. N.E. Salem. OR 97311

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EMPLOYMENT APPEALS BOARD DECISION 2022-EAB-1061

Late Application for Review Allowed Order No. 22-UI-202012 Reversed ~ Eligible for Pandemic Unemployment Assistance Weeks 48-20 through 32-21

PROCEDURAL HISTORY: On July 23, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was eligible for PUA benefits, with a weekly benefit amount of \$205, effective November 22, 2020. Claimant filed a timely request for hearing. On April 25, 2022, ALJ Frank conducted a hearing that concluded with the parties having agreed to a continuance at a later date. On July 18, 2022, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for August 2, 2022 at 9:30 a.m. On August 2, 2022, ALJ Janzen conducted a hearing at which claimant failed to appear, and on August 3, 2022 issued Order No. 22-UI-199668, affirming the July 23, 2021 PUA determination by concluding that claimant was eligible to receive PUA benefits with a weekly benefit amount of \$205 for the weeks including November 22, 2020 through August 14, 2021 (weeks 48-20 through 32-21). On August 11, 2022, OAH mailed a letter stating that Order No. 22-UI-199668 was canceled because claimant did not receive notice of the August 2, 2022 hearing, and that a new hearing would be scheduled.¹ On August 31, 2022, ALJ Janzen conducted a hearing, and on September 2, 2022 issued Order No. 22-UI-202012, reversing the July 23, 2021 PUA determination by concluding that claimant was not eligible to receive PUA benefits for weeks 48-20 through 32-21. On September 22, 2022, Order No. 22-UI-202012 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On October 18, 2022, claimant filed a late application for review of Order No. 22-UI-202012 with EAB.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of claimant's late application for review and statements attached thereto, and has been marked as EAB Exhibit 1, and a

¹ Because claimant failed to appear at the August 2, 2022 hearing due to a lack of notice and OAH subsequently canceled Order No. 22-UI-199668 which was issued after that hearing took place, EAB has not considered testimony taken during the August 2, 2022 hearing when reaching this decision.

copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

WRITTEN ARGUMENT: On November 21, 2022, claimant filed two documents with EAB: a written argument and a "Request to Admit Additional Evidence to The Record" (herein, "claimant's request"). EAB considered claimant's written argument when reaching this decision. In claimant's request, claimant requested that several pieces of evidence, including the transcripts from all three hearings, as well as additional documentation regarding claimant's employment and correspondence with the Office of Administrative Hearings (OAH), be admitted to the record. The hearing transcripts are already part of the record on appeal, and as such do not need to be added to the record. Regarding the other documents that claimant submitted for consideration, claimant did not show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing, or that the information contained therein is relevant and material to EAB's determination. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Prior to the weeks at issue in this decision, claimant last worked in the United States in 2016. In August 2017, claimant began working in China for Wuxi United International School as a teacher. Wuxi United International School did not have any offices in the United States. In 2019 and through the weeks at issue, claimant maintained an Oregon teaching license, which was required for her to be permitted to teach abroad and be "designated a foreign expert." August 31, 2022 Transcript at 50. Claimant was also required to "continue with [her] professional development" during that time. August 31, 2022 Transcript at 50.

(2) In 2019, claimant earned a gross of \$53,601 from Wuxi United International School. Claimant reported the wages on her federal tax return for the 2019 tax year, but the wages were exempt from income tax in the United States because claimant paid taxes on them in China.

(3) In July 2020, claimant's contracted assignment with Wuxi United International School ended. Thereafter, claimant traveled to Cameroon and stayed with acquaintances while looking for work elsewhere.

(4) Around early October 2020, claimant received a job offer from Teda Global Academy in Tianjin, China, to work as a teacher. Claimant accepted the offer, and the employer intended claimant to start as soon as possible. However, claimant was required to first return to the United States to apply for a visa and related permits so that she could return to work in China. On October 30, 2020, claimant returned to Oregon, where she had resided when not living abroad. On November 26, 2020, Teda Global Academy notified claimant that they were rescinding the job offer because the office that issued residence permits shut down due to rising COVID-19 infections in the country, and because China was no longer permitting foreign nationals to enter the country.

(5) On December 3, 2020, claimant filed an initial claim for PUA benefits. The Department determined that claimant had a valid PUA claim with a weekly benefit amount of \$205 per week. The Department also determined that claimant did not have sufficient wages in her base year to qualify her for a regular

unemployment insurance (regular UI) claim. Claimant subsequently claimed PUA benefits for the weeks including November 22, 2020 through August 14, 2021 (weeks 48-20 through 32-21). These are the weeks at issue. The Department paid claimant benefits for all of the weeks at issue. At the time that claimant filed her initial claim, the maximum allowable PUA weekly benefit amount in Oregon was \$648.²

(6) Around early September 2021, claimant accepted a job offer with another educational employer in China, and moved back to China shortly thereafter.

(7) Order No. 22-UI-202012, mailed to claimant on September 2, 2022, stated, "You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed." Order No. 22-UI-202012 at 5. Order No. 22-UI-202012 also stated on its Certificate of Mailing, "Any appeal from this Order must be filed on or before September 22, 2022 to be timely." OAH did not sent claimant a copy of Order No. 22-UI-202012 by email, despite the fact that she had previously requested that they send her correspondence via email.

(8) At the time that Order No. 22-UI-202012 was mailed to claimant, claimant had been experiencing significant delays in the delivery of her mail due to conditions in China relating to the COVID-19 pandemic.

CONCLUSIONS AND REASONS: Claimant's late application for review is allowed. Claimant was eligible for PUA benefits during the weeks at issue, with a weekly benefit amount of \$648.

Late Application for Review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a "reasonable time" upon a showing of "good cause." ORS 657.875; OAR 471-041-0070(2). "Good cause" means that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A "reasonable time" is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 22-UI-202012 was due by September 22, 2022. Because claimant did not file her application for review until October 18, 2022, the application for review was late. In a statement attached to her application for review, claimant explained that due to China's COVID-19 policy at the time regular mail had been taking "more than one month" to reach her. EAB Exhibit 1 at 1. Claimant further explained that she did not receive a copy of the order under review "in time to file [her] Application for Review, as stated in the materials received only last week." EAB Exhibit 1 at 3.

 $^{^{2}}$ EAB has taken notice of these facts, which are generally cognizable facts. OAR 471-041-0090(1). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

From these statements, it is not clear exactly when claimant received a copy of the order under review. However, given the significant delays in mail delivery that were occurring at the time and claimant's assertion that she did not receive it "in time," it is reasonable to conclude that claimant did not receive the order under review until after the timely filing had passed as a result of the aforementioned mail delays. This constituted circumstances beyond claimant's reasonable control, which ceased when she received the order under review.

Further, claimant stated that "the materials [were] received only last week." EAB Exhibit 1 at 3. This suggests that claimant received the order under review sometime during the week prior to the week that she filed her application for review (which was during the week of October 16, 2022 through October 22, 2022). Because the exact date on which claimant received the order under review cannot be determined, it is not clear whether she filed her application for review within a reasonable time after those circumstances ceased—i.e., seven days after she received the order under review. However, October 18, 2022 was a Tuesday, and, as explained, the record suggests that claimant received the order under review between October 9, 2022 and October 15, 2022. Thus, unless claimant received the order under review on Sunday or Monday of the week before she filed her application for review, she filed it within a reasonable time. By function of probability alone, claimant more likely than not received the order under review within the last five days of the week before the week in which she filed the application for review. Therefore, the preponderance of the evidence shows that claimant filed her application for review within a reasonable time after the circumstances which prevented a timely filing ceased, and as such had good cause to file the late application for review.

Eligibility for PUA benefits. Under the CARES Act, 15 U.S.C. Chapter 116, to be eligible to receive PUA benefits, an individual must be a "covered individual" as that term is defined by the Act. 15 U.S.C. § 9021. In pertinent part, the Act defines a "covered individual" as an individual who "is not eligible for regular compensation or extended benefits under state or federal law or pandemic emergency unemployment compensation under section 9025, including an individual who has exhausted all rights to regular unemployment or extended benefits under state or federal law or pandemic emergency unemployment compensation under section 9025" and provides a self-certification that the individual "is otherwise able to work and available for work within the meaning of applicable State law," but is rendered unemployed or unavailable to work because of one or more of 11 listed reasons that relate to the COVID-19 pandemic, including that the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID–19 public health emergency. 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(gg).

As explained by federal guidance,

Section [9021] of the Act provides for payment of PUA to "covered individuals." "Covered individuals" are those individuals not qualified for regular unemployment compensation, extended benefits under state or Federal law, or pandemic emergency unemployment compensation (PEUC), including those who have exhausted all rights to such benefits. "Covered individuals" also include self-employed, individuals seeking part-time employment, individuals lacking sufficient work history, or those otherwise not qualified for regular UC, extended benefits under state or federal law, or PEUC.

For purposes of PUA coverage, an individual "lacking sufficient work history" means an individual (1) with a recent attachment to the labor force (2) who does not have sufficient wages in covered employment during the last 18 months to establish a claim under regular UC, and (3) who became unemployed or partially unemployed because of one of the COVID-19 related reasons identified under Section [9021]. Demonstration of a recent attachment to the labor force for PUA coverage purposes also includes individuals who had a bona fide offer to start working on a specific date and were unable to start due to one of the COVID-19 related reasons identified under Section [9021].

U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 16-20 (April 15, 2020) at I-3. Furthermore, the Department of Labor has stated:

Individuals eligible for PUA in multiple states. To expand on Question 7 of Attachment I to UIPL No. 16-20, Change 1, an individual (whether self-employed or working in covered employment) must file their PUA claim with the state where they were working at the time of becoming unemployed, partially unemployed, or unable or unavailable to work because of approved COVID-19 related reason(s). If the individual worked in more than one state at that time, the individual may file a PUA claim in any of those states.

If the individual was working outside of the country in a job with a connection to the U.S. labor market at the time of becoming unemployed, partially unemployed, or unable or unavailable to work (*e.g.*, as a Peace Corps participant), then the individual should file in the state in which they reside. Absent this situation, <u>an individual may not file a PUA claim with a state in which they did not</u> work.

UIPL 16-20, Change 6 (September 23, 2021) at 7-8 (emphases in original).

The record shows that claimant did not have sufficient base-year wages to qualify her for a regular UI claim, as she had not worked in Oregon since 2016. The record also shows that claimant became unemployed on November 26, 2020 when her would-be employer in China rescinded her job offer due to escalating COVID-19 cases and the ensuing policy changes that made it impossible for claimant to return to China for work. Thus, claimant was scheduled to commence employment and did not have a job or was unable to reach the job as a direct result of the COVID–19 public health emergency. Despite this, the order under review concluded that claimant was not eligible for PUA benefits during the weeks at issue because neither claimant, nor her previous or prospective employers, "had any connection to the Oregon or U.S. labor market." Order No. 22-UI-202012 at 5. The record does not support this conclusion.

In so concluding, the order under review relied upon the above-cited guidance issued by the US Department of Labor, which states, in relevant part, that an individual may not file a PUA claim with a state in which they did not work unless they were "working outside of the country in a job with a connection to the U.S. labor market at the time of becoming unemployed, partially unemployed, or unable or unavailable to work (*e.g.*, as a Peace Corps participant)." Reliance on this guidance is misplaced, however. As the header for that section shows, the quoted passage applies to individuals who are potentially eligible for PUA benefits in multiple states. This is further supported by the statement that it "expand[s] on Question 7 of Attachment I to UIPL No. 16-20, Change 1," which relates

specifically to individuals who live in one state while self-employed in another state.³ Additionally, the circumstances that led claimant to become unemployed, and thus potentially eligible for PUA benefits, did not occur while she was working outside of the country. At the time that claimant's job offer was rescinded, claimant was living in Oregon. Thus, because claimant was not an individual who lived in one state while self-employed in another state, and because she did not become unemployed while working outside of the country, this guidance is inapplicable to her circumstances.

Furthermore, regardless of whether this guidance was applicable to claimant's circumstances, the conclusion that claimant had no attachment to the U.S. labor market remains unsupported by the record. At hearing, the Department's witness testified that a connection to the Oregon labor market would be demonstrated by "doing business within our labor market, work performed within our labor market, in the United States." August 31, 2022 Transcript at 14. The Department offered no authority to explain how they arrived at this requirement. Because the CARES Act itself does not define or even require an "attachment" to a particular labor market, it is appropriate to look to the text of the Department of Labor's guidance.

Per that guidance, the "attachment" requirement derives from the "lacking sufficient work history" requirement, which means an individual with a recent attachment to the labor force who does not have sufficient wages in covered employment during the last 18 months to establish a claim under regular UI; demonstration of a recent attachment to the labor force for PUA coverage purposes also includes individuals who had a bona fide offer to start working on a specific date and were unable to start due to one of the COVID-19 related reasons identified under section 9021 of the CARES Act. UIPL 16-20 at I-3. The record shows that claimant had a bona fide offer but was unable to start due to being unable to reach the job as a direct result of the COVID-19 public health emergency, as China had effectively closed its borders to foreign workers at that time. Additionally, claimant maintained an Oregon teaching license during and prior to the weeks at issue, presumably paying fees to the State to keep the license active, so that she could be designated as a "foreign expert" while teaching abroad. This demonstrates an attachment to the U.S. labor market, as claimant was teaching specifically in her capacity as an attachment to the U.S. labor market, she has made that showing.

Because claimant was scheduled to commence employment and was unable to reach the job as a direct result of the COVID–19 public health emergency, and the guidance in UIPL16-20 prohibiting the filing of a PUA claim in a state where claimant had not worked is inapplicable to claimant's circumstances, claimant was eligible for PUA during the weeks at issue.

Weekly Benefit Amount. An individual's weekly benefit amount for the PUA program is determined under 15 U.S.C. § 9021(d)(1), which states, in relevant part, that "the weekly benefit amount authorized under the unemployment compensation law of the State where the covered individual was employed, except that the amount may not be less than the minimum weekly benefit amount described in section

³ That guidance states: "7. Question: If an individual is living in one state and is self-employed in another state, where should the individual file for PUA benefits?

Answer: The self-employed individual must file with the state where he or she was working at the time of becoming unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason listed in section 2102(a)(3)(A)(ii)(I) of the CARES Act. If an individual worked in more than one state at this time, the individual may file in any of those states." UIPL 16-20, Change 1 (April 27, 2020) at I-3.

625.6 of title 20, Code of Federal Regulations, or any successor thereto." 20 C.F.R. 625.6(a)(1) states, in relevant part, that "in computing an individual's weekly amount of DUA,⁴ qualifying employment and wage requirements and benefit formula of the applicable State law shall be applied; and for purposes of this section, employment, wages, and self-employment which are not covered by the applicable State law shall be treated in the same manner and with the same effect as covered employment and wages[.]" 20 C.F.R. 625.6(a)(2) states, in relevant part, that "for purposes of paragraph (a)(1) of this section, the base period to be utilized in computing the DUA weekly amount shall be the most recent tax year that has ended for the individual (whether an employee or self-employed) prior to the individual's unemployment that was a direct result of the major disaster."

In sum, the PUA program mandates that an individual's weekly benefit amount should be calculated according to the applicable regulations for the DUA program found at 20 C.F.R. Part 625; and the applicable DUA regulation mandates that the weekly benefit amount should be calculated according to state law, using the individual's non-covered wages from the tax year prior to the year in which the individual's pandemic-related unemployment occurred. In turn, the applicable Oregon law states: "An eligible individual's weekly benefit amount shall be 1.25 percent of the total wages paid in the individual's base year. However, such amount shall not be less than the minimum, nor more than the maximum weekly benefit amount." ORS 657.150(4)(a).

Claimant became unemployed due to COVID-19 related closures in 2020. Therefore, her wages from the 2019 tax year are used to determine her PUA weekly benefit amount. Claimant earned \$53,601 in wages in 2019. 1.25% of this amount, when rounded to the nearest whole dollar, is \$670, which is more than the maximum allowable weekly PUA benefit amount in Oregon at the time that claimant filed her initial claim. Therefore, under 15 U.S.C. § 9021(d)(1), 20 C.F.R. 625.6(a), and ORS 657.150, claimant was entitled to a weekly benefit amount of \$648 for each of the weeks at issue.

DECISION: Claimant's late application for review of Order No. 22-UI-202012 is allowed. Order No. 22-UI-202012 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;

S. Serres, not participating.

DATE of Service: <u>December 30, 2022</u>

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.

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

⁴ The PUA program substitutes the term "COVID–19 public health emergency" for the term "major disaster" and the term "pandemic" for the term "disaster" each place it appears in the applicable Disaster Unemployment Assistance (DUA) regulations. *See* 15 U.S.C. § 9021(h).

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判决会影响您的失业救济金。如果您不明白本判决, 请立即联系就业上诉委员会。如果您不同意此判决, 您可以按照该判决结尾所写的说明, 向俄勒冈州上诉法院提出司法复审申请。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決, 請立即聯繫就業上訴委員會。如果您不同意此判決, 您可以按照該判決結尾所寫的說明, 向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

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Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិន យល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តី សម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលារឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាម សេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜືນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການ ອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس مناز عات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، میتوانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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