STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE APPEALS COMMISSION

In the Matter of

[redacted], Appeal Docket No.: [redacted]263621W

Claimant,

[redacted], UIA Case No.: [redacted]

Employer.

DECISION OF UNEMPLOYMENT INSURANCE APPEALS COMMISSION

This case is before the Unemployment Insurance Appeals Commission (Commission) pursuant to the claimant's timely appeal from a March 29, 2021 decision by an Administrative Law Judge (ALJ). The decision affirmed a February 1, 2021 Unemployment Insurance Agency (Agency) redetermination that found that the claimant was disqualified for benefits under Section 27(k) of the Michigan Employment Security Act.

Having reviewed the record in this matter, we find the ALJ's decision must be reversed. Our reasons are as follows.

Section 27(k) of the Michigan Employment Security Act (Act) states in pertinent part:

> (1) Benefits are not payable on the basis of services performed by an alien *unless* the alien is an individual who was lawfully admitted for permanent residence at the time the services were performed, was lawfully present for the purpose of performing the services, **or was permanently residing in the United States under color of law at the time the services were performed**, including an alien who was lawfully present in the United States under Section 212(d)(5) of the immigration and nationality Act, 8 USC 1182.

MCL 421.27(k) (emphasis added).

As defined by the Act, an individual may receive benefits when they are "permanently residing in the United States under color of law," (PRUCOL) at the time they performed the services at issue.

The definition of "under color of law," as contained in statutes administering federal benefits, has been considered "expansive and elastic." *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985). The Social Security Administration, which uses PRUCOL as a standard to qualify for benefits, derives its definition of PRUCOL from *Berger*. The court in *Berger* identified that the term PRUCOL is designed to adapt over time with developments in immigration policy and is "organic and fluid, rather than prescriptive and formulaic." *Id.* at 1571.

Following *Berger*, the SSA considers aliens who are PRUCOL as those who are "residing in the United States with the knowledge and permission of the DHS and whose departure from the United States the DHS does not contemplate enforcing." Social Security Administration Programs Operations Manual System (POMS), SI 00501.420 Permanent Residence under Color of Law (PRUCOL) Pre-1996 Legislation (2012). The guidance states that the administration will consider a resident alien in the above category if "[i]t is the policy or practice of the DHS not to enforce the departure of aliens in such category," or "[b]ased on all the facts and circumstances in that particular case, it appears that DHS is otherwise permitting the alien to reside in the United States indefinitely." *Id.*

We are aware of two decisions in which an "expansive and elastic" view of "under color of law" has been applied in Michigan unemployment benefit determinations. These decisions have reflected the understanding that the PRUCOL requirement does not necessarily require an active work authorization. Citing a group of cases from different jurisdictions,[1] the ALJ in *Lopez De Rivera* adopted the definition that under color of law "in these types of cases means when United States Citizen and Immigration Enforcement (USICE) is aware of claimant's presence and has not taken any action to deport the claimant when it could have." *Lopez De Rivera v. Northern Staffing Services Co.,* Docket No. 17-021857, (March 26, 2018), ALJ Marie L. Wolfe, at 8. There, the ALJ found that the claimant was permanently residing in Michigan under color of law even though her work authorization had expired, and she had not renewed the authorization because of cost concerns.

In *Rosalba v. Mark Hotlzman*, B-2010-23336 (March 18, 2011), ALJ Newell held that the claimant met the definition of PRUCOL because "the government knew full well where she was located and failed to take action" to remove the claimant. This adopts an even broader interpretation of PRUCOL than that advanced by *Berger*, the Social Security Administration, or *Lopez De Rivera*.

In the instant case, the evidence overwhelmingly suggests that the claimant was residing in the United States under color of law. The claimant has had a valid Employment Authorization Document (EAD) since September 1, 2020 and had previously been authorized to work from September 2017 to September 2018. The claimant's previous work authorization and her continued authorization after the time period at issue, acknowledged by the Agency, demonstrate that she was residing in the United States with the knowledge and permission of the Department of Homeland Security and USICE. As in *Lopez de Rivera*, the claimant did not have official work authorization due to the considerable expense required to apply for reauthorization after hers lapsed in 2018.

Although the claimant did not have an active Employment Authorization Document during the time at issue, her immigration court proceedings indicate that the DHS and USICE were aware of her presence and were not actively seeking her deportation. The claimant was permanently residing in the country under color of law and did not commit any felonies or misconduct[2] that would have

[1] *Castillo v. Jackson*, 586 N.E.2d 404 (Ill App 1990), *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988), *Lapre v Dept of Emplymt Sec*, 513 A.2d 10 (RI 1986), *Cruz v. Comm'r of Public Welfare*, 478 NE2d 1262 (Mass 1985), *Antillion v. Dept of Emplymnt Sec*, 688 P2d 455 (Utah 1984), and *Rubio v. Emplymnt Div*, 674 P2d 1201 (Or App 1984).

[2] We are inferring that the claimant was not convicted of any felonies and kept a clean record, as these are requirements for work reauthorization and she was able to obtain an EAD on September 1, 2020.

put her status in jeopardy. The Agency policy of determining whether the claimant is eligible for benefits solely through work authorization is incompatible with a straightforward application of Section 27(k). The claimant, by virtue of the order of prosecutorial discretion issued and the understanding that USICE would not actively seek her deportation, was in the United States under color of law for purposes of her unemployment claim.

Therefore,

IT IS ORDERED that the ALJ's decision is REVERSED.

IT IS FURTHER ORDERED that this matter is referred to the Agency for action consistent with this decision.

IT IS FURTHER ORDERED that the Commission retains no jurisdiction in this matter.

Lester A. Owczarski Commissioner

Andrea C. Rossi Commissioner

Julie A. Petrik Chairperson

MAILED AT LANSING, MICHIGAN AUGUST 13, 2021

This decision shall be final unless EITHER (1) the Unemployment Insurance Appeals Commission RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is:

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME. SEPTEMBER 13, 2021

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