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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of:)
)
 [REDACTED],) OHA Case No. 10-FH-255
)
 Claimant.) DPA Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) was an applicant for Adult Public Assistance (APA) and Medicaid benefits (Exs. 2.0 – 2.9). The Claimant completed and signed her application on June 28, 2010 (Ex. 2.0). Her application was received by the State of Alaska Division of Public Assistance (DPA or Division) on that same date (Ex. 2.0).

On July 2, 2010 the Division mailed to the Claimant a notice stating that her application for APA and Medicaid benefits had been denied (Ex. 4). The Claimant requested a hearing with regard to the Division’s denial of her application for APA and Medicaid benefits on July 22, 2010 (Exs. 5.0, 5.1).

This Office has jurisdiction to resolve this case pursuant to 7 AAC 49.010.

The Claimant’s hearing began as scheduled on August 17, 2010 before Hearing Examiner Jay Durych. The Claimant participated by telephone but did not testify. The Claimant verbally authorized Ms. [REDACTED] to represent her at the time of the hearing. Ms. [REDACTED] participated by telephone, represented the Claimant, and testified on the Claimant’s behalf. DPA Public Assistance Analyst [REDACTED] appeared in person to represent and testify on behalf of the Division. All testimony and exhibits offered by the parties were received into evidence. At the end of the hearing the record was closed except for certain specific post-hearing filings.

The Claimant’s post-hearing filing was received on August 17, 2010. The Division’s post-hearing filing was received on August 18, 2010. At that time the record was closed and the case was submitted for decision.

ISSUE

Was the Division correct when, on July 2, 2010, it denied the Claimant's June 28, 2010 application for Adult Public Assistance and APA-related Medicaid benefits, based on the assertion that the Claimant had not yet resided in the United States as a lawful permanent resident for at least five (5) years?

SUMMARY OF DECISION

The Claimant provided credible documentary evidence indicating that she has resided in the United States since 2000. However, the Claimant did not prove, by a preponderance of the evidence, that she had *attained the legal status of a lawful permanent resident* of the United States at least five (5) years prior to the date of filing of her application. Accordingly, the Division was correct when, on July 2, 2010, it denied the Claimant's June 28, 2010 application for Adult Public Assistance and APA-related Medicaid benefits, because the Claimant had not yet resided in the United States as a *lawful permanent resident* for at least five (5) years.

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. A Samoan passport issued to the Claimant on [REDACTED], 1999 indicates that the Claimant was born in Samoa in 1955 and was a Samoan citizen as of [REDACTED], 1999 (Exs. C-2, C-4).
2. A U.S. passport issued to the Claimant on [REDACTED], 2000 indicates that the Claimant was authorized to enter the U.S. on that date "for purposes of medical treatment" (Ex. C-5).
3. A stamp on a page of the U.S. passport issued to the Claimant on February 8, 2000 indicates that the Claimant first entered the U.S. on [REDACTED], 2000 (Ex. C-1).
4. The Claimant obtained a Permanent Resident card (Ex. C-3). This card states that the Claimant has been a resident since May 7, 2009. *Id.*
5. An undated computer printout from the U.S. Citizenship and Immigration Services lists the Claimant's date of entry into the U.S. as [REDACTED], 2009 (Ex. 2.12). This document also states that the Claimant is a "lawful permanent resident" and that her "employment [is] authorized." *Id.*
6. A computer printout from the U.S. Department of Homeland Security dated June 29, 2010 lists the Claimant's date of entry into the U.S. as [REDACTED], 2009 (Ex. 2.11). This document also states that the Claimant is a "lawful permanent resident" and that her "employment [is] authorized." *Id.*
7. On June 28, 2010 the Claimant completed and signed an application for Adult Public Assistance and Medicaid benefits (Exs. 2.0-2.9). This application was received by the Division on June 28, 2010 (Ex. 2.0).

8. On June 28, 2010 the Claimant participated in an eligibility interview with a DPA representative (Ex. 2.10). On that date the DPA Representative accessed the computer records referenced in Paragraphs 5 and 6, above and concluded that the Claimant's "lawful permanent residence took effect May 7, 2009." *Id.*

9. On July 2, 2010 the Division mailed to the Claimant a notice stating that her June 28, 2010 application for APA and APA-related Medicaid benefits had been denied (Ex. 4). The notice stated in relevant part as follows:

You do not meet the five year bar requirement. ¹ Qualified Aliens who entered the U.S. on or after August 22, 1996 cannot receive Adult Public Assistance (APA) benefits until they have been in the U.S. for five years or until they become U.S. Citizens.

The Division used the Department of Homeland Security's database to determine when the Claimant became a "qualified alien" and thus when the "five year bar" period would begin and end (Ex. 5.2; DPA Hearing Representative's testimony).

10. The Claimant requested a hearing on July 22, 2010, asserting that her passport and other legal documents proved that she had been a U.S. resident since January 2000 (Exs. 5.0, 5.1).

11. At the hearing of August 17, 2010 the Claimant's representative credibly testified in relevant part as follows:

- a. The Claimant is a Samoan citizen, but has resided in the United States since 2000. She has been employed in the United States and has thereby become entitled to receive Social Security benefits.
- b. The Claimant became a "resident alien" of the United States on May 7, 2009, but her original date of entry was March 4, 2000, over nine years earlier.
- c. The Claimant needs medical assistance.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves an initial application for Adult Public Assistance and Medicaid benefits. The Claimant therefore has the burden of proving her factual assertions ² by a preponderance of the evidence. ³

¹ Pursuant to 8 U.S.C. Section 1613(a), a "qualified alien" (as defined by 8 U.S.C. § 1641(b), set forth below), who entered the United States on or after August 22, 1996, "is not eligible for any Federal means-tested public benefit for a period of 5 years beginning on the date of the alien's entry into the United States with a status within the meaning of the term "qualified alien." This five year period is referred to as the "five year bar."

² "Ordinarily the party seeking a change in the status quo has the burden of proof." *State of Alaska Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). Here the Claimant is seeking to change the existing status quo by obtaining benefits.

II. Principles of Immigration Law Relevant to Decision.

The Immigration and Nationality Act, 8 U.S.C. Section 1101 *et. seq.*, regulates the admission of aliens into the United States and designates the Secretary of Homeland Security and the Secretary of State as the principal administrators of its provisions. *See* 8 U.S.C. Sections 1103, 1104. It sets up a multi-step process for the issuance of permanent resident cards, commonly referred to as “green cards.” *Liberty Fund, Inc. v. Chao*, 394 F.Supp.2d 105, 108 (D.D.C. 2005).

The terminology and procedures related to becoming a permanent resident were summarized in *Ogbolumani v. U.S. Citizenship and Immigration Services*, 523 F.Supp.2d 864, 869 (D.Ill. 2007):

The terms “Immigrant,” “Permanent Resident,” and “Lawfully Admitted for Permanent Residence,” are all used to describe an alien who is a Lawful Permanent Resident of the United States. *See* 8 U.S.C. § 1101(a)(15) & (20); *see also* 8 U.S.C. 1255. A Permanent Resident Card, also commonly known as a “Green Card,” is issued . . . in connection with “Lawful Admission for Permanent Residence.” 8 C.F.R. § 245.2(b); *see also* 8 C.F.R. § 103.2(b)(17) When a non-immigrant, while in the United States, applies for and is granted an Adjustment of Status under § 1255, such an alien becomes a Lawful Permanent Resident of the United States as of the date of the approval and is issued a Permanent Resident Card (Green Card). 8 C.F.R. § 245.2(a) (5)(ii).

Once an alien has been granted lawful *temporary* resident status, the alien may submit an application for lawful *permanent* resident status. 8 C.F.R. § 245a.3. Pursuant to 8 C.F.R. § 245.1(a), “[a]ny alien who is physically present in the United States . . . may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application.”

The process of actually *obtaining* a permanent residence card was summarized in *Sharkey v. Quarantillo*, 541 F.3d 75, 80 at footnote 4 (2nd Cir. 2008):

Upon approving the application, the USCIS grants the applicant the status of lawful permanent resident A permanent resident card (Form I-551, formerly I-151), popularly known as the green card, is eventually delivered to the applicant as evidence of lawful admission for permanent residence. As such delivery may take months, the interviewing officer places an endorsement of the approval in the applicant's passport as temporary evidence of residence to facilitate foreign travel

³ The “preponderance of the evidence” standard is the normal standard of proof in an administrative proceeding. *Amerada Hess Pipeline v. Alaska Public Utilities Commission*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). Preponderance of the evidence is defined as “[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Black’s Law Dictionary* 1064 (West Publishing, Fifth Edition, 1979).

and return to the United States. That endorsement, as well as the I-551 green card, are deemed by the USCIS regulations to be official records for purposes of verifying the grant of lawful residence

See also Peng v. Gonzales, 2007 WL 2141270 (N.D.Cal. 2007) (“[b]oth the temporary I-551 passport stamp and the I-551 “Green Card” are deemed evidence of permanent resident status by federal regulations, as are other official agency records that have been “issued or endorsed to show admission for permanent residence. 8 CFR Section 103.2(b)(17).”

III. The Adult Public Assistance Program – In General.

The Adult Public Assistance (APA) Program was established to furnish financial assistance to needy aged, blind, and disabled persons and to help them attain self-support or self-care. *See* A.S. 47.25.590(b); see also DPA website at <http://health.hss.state.ak.us/dpa/programs/apa/> (date accessed July 31, 2009). People who receive APA financial assistance are over 65 years old or have severe and long term disabilities that impose mental and physical limitations on their day-to-day functioning. *Id.*

IV. The Adult Public Assistance Program – Statutes and Regulations Pertinent to This Case.

Pursuant to 8 U.S.C. Section 1613(a), a “qualified alien” (as defined by 8 U.S.C. § 1641(b), set forth below), who entered the United States on or after August 22, 1996, “is not eligible for any Federal means-tested public benefit for a period of 5 years beginning on the date of the alien’s entry into the United States with a status within the meaning of the term “qualified alien.”

Alaska Statutes (“AS”) § 47.25.430(f), titled “Adult Public Assistance,” provides as follows:

(f) Unless the person is not eligible under the limited eligibility provision of 8 U.S.C. 1613, a state payment under AS 47.25.430 - 47.25.615 shall be made to a person who (1) meets the requirements of state law; (2) *is a qualified alien as defined in 8 U.S.C. 1641*; and (3) otherwise meets the eligibility requirements of 42 U.S.C. 1381 - 1383. [Emphasis added].

Federal statute 8 U.S.C. § 1641(b), referred to in AS 47.25.430, above, defines “qualified alien” in relevant part as follows:

For purposes of this chapter, the term “qualified alien” means an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is - (1) *an alien who is lawfully admitted for permanent residence* under the Immigration and Nationality Act [8 U.S.C. § 1101 et. seq.] [Emphasis added].

Federal statute 8 U.S.C. § 1101(20) provides in relevant part that “[t]he term “lawfully admitted for permanent residence” means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”

State Regulation 7 AAC 40.090, titled “Factors of Eligibility,” provides as follows:

Eligibility for assistance is based upon (1) U.S. citizenship or resident alien status; (2) residence in the state; (3) age; (4) residence outside certain institutions; (5) blindness, for aid to the blind; (6) disability, for aid to the permanently and totally disabled; (7) financial need with respect to resources; and (8) financial need with respect to income.

State Regulation 7 AAC 40.110(a), titled “Citizenship and Residency,” provides in relevant part that, “[t]o be eligible for assistance, an applicant, in addition to being a resident of the state, as required by AS 47.25.430(a), must be a citizen of the United States or a qualified alien, as described in AS 47.25.430(f).

V. The Adult Public Assistance Program – Relevant Policy Manual Provisions.⁴

Adult Public Assistance Manual Section 421, titled “U.S. Citizenship And Eligible Alien Status,” provides in relevant part as follows:

To receive APA, a person must be: a United States citizen or U.S. National; *a qualified alien, as described in section 421-2* [Emphasis added].

Adult Public Assistance Manual Section 421-2, titled “Qualified Aliens,” provides in relevant part as follows:

A qualified alien is defined as someone who, at the time of application is: (1) *A lawful permanent resident* [Emphasis added].

Adult Public Assistance Manual Section 421-6, titled “Documentation Of U.S. Citizenship And Eligible Alien Status,” provides in relevant part as follows:

B. Acceptable Documentation . . . Sources of verification include birth certificates, certificates of citizenship or naturalization provided by the U.S. Citizenship & Immigration Services (USCIS), U.S. passports . . .

C. Proof of Qualified Alien Status An alien must provide proof of his or her qualified alien status. The following documents are acceptable for determining alien status and whether the alien is subject to the five year waiting period Legal Permanent Residents: I-551 (referred to as green card)

D. Systematic Alien Verification For Entitlements (SAVE) Program.

The Systematic Alien Verification for Entitlements (SAVE) is a program run by the U.S. Citizenship and Immigration Services which provides both an online system and a paper-based process to verify the immigration status of aliens.

⁴ The formatting used in the Policy Manual has been revised as for this decision so as to condense the text. The quoted text itself is unchanged.

The Verification Information System (VIS) is the online verification system. The paper-based process makes use of the G-845, Document Verification Request.

The documents provided by each alien as verification of immigration status must be authenticated by using the SAVE program.

VI. The Medicaid Program – In General.

Medicaid is an entitlement program created by the federal government. See DOA website at <http://health.hss.state.ak.us/dpa/programs/medicaid/> (date accessed July 31, 2009). It is the primary public program for financing basic health and long-term care services for low-income Alaskans. *Id.* It is funded fifty percent by federal funds and fifty percent by State general funds. *Id.* The program focuses on coverage for low-income children, pregnant women, families, the elderly, blind and the permanently disabled. *Id.*

The Medicaid program is administered in Alaska by the Division of Health Care Services (DHCS). *Id.* While DHCS is responsible for program and policy development, the Division of Public Assistance (DPA) is responsible for determining eligibility for Medicaid benefits. *Id.*

VII. The Medicaid Program – Regulations Relevant to This Case.

A person who has been approved for Adult Public Assistance is automatically eligible for Medicaid benefits. 7 AAC 100.002(d)(1); 7 AAC 100.410(b). The category of Medicaid which a person automatically obtains as a result of APA eligibility is known as “APA-related Medicaid.”

State Medicaid regulation 7 AAC 100.400(a)(2) makes the APA eligibility factors stated in 7 AAC 40.090 (set forth above) applicable to eligibility determinations for the APA-related Medicaid eligibility category.

Pursuant to state Medicaid regulation 7 AAC 100.400(a)(2) and Adult Disabled and Long Term Care Medicaid Manual Section 520-B, the Division uses the same criteria in determining applicability of the “five year rule” in Medicaid cases as it does in Adult Public Assistance cases (Ex. 11).

ANALYSIS

Introduction; Definition of Issues; Burden of Proof.

There are no disputed factual issues in this case. The Claimant does not dispute that her Permanent Resident Card has an effective date of May 7, 2009 (Ex. C-3). The Division does not dispute the Claimant’s contention that she actually entered the U.S. over nine (9) years earlier in 2000. Accordingly, the only issue in this case is the purely legal issue of which date controls for purposes of the Claimant’s eligibility for APA and APA-related Medicaid benefits.

The basis on which the Division denied the Claimant’s application is well stated in the Division’s post-hearing filing of August 18, 2010:

[I]n order for [the Claimant] to be eligible for the APA/ME programs, she must be in the United States five years from *the date of permanent residency* identified by Homeland Security. The date identified by Homeland Security is May 7, 2009. [Emphasis added].

Thus, the precise issue in this case is whether the Division's regulations require that the Division use the *date of qualification as a permanent resident* as the start date for the five year bar period. If they do, then the Division's denial of the Claimant's application was correct. If they do not, then the Division erred in denying the Claimant's application based on the "five year rule."

I. Analysis Under The Adult Public Assistance Program.

Alaska Statute ("AS") Section 47.25.430(f) requires that a person who is not a citizen of the United States be "a qualified alien as defined in 8 U.S.C. 1641" in order to receive Adult Public Assistance (APA). The federal statute cited in the state statute, 8 U.S.C.A. § 1641(b) defines "qualified alien" in relevant part as "an alien *who is lawfully admitted for permanent residence* under the Immigration and Nationality Act [8 U.S.C. § 1101 et. seq.]." In turn, federal statute 8 U.S.C. § 1101(20) provides in relevant part that "[t]he term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." Thus, under the applicable statutes, the legal issue in this case is when the Claimant was "lawfully accorded the privilege of residing permanently in the United States as an immigrant."

The Division's regulations provide no helpful guidance in determining when the Claimant was "lawfully accorded the privilege of residing permanently in the United States as an immigrant;" they merely refer back to the state and federal statutory definitions. See 7 AAC 40.090 and 7 AAC 40.110(a), set forth in the Principles of Law, above. Accordingly, it is necessary to refer to the Division's policy manual to determine how the phrase "lawfully accorded the privilege of residing permanently in the United States as an immigrant" is to be determined for purposes of the APA program.

Adult Public Assistance Manual Section 421-2, titled "Qualified Aliens," provides in relevant part that "[a] qualified alien is defined as someone who, at the time of application is: (1) *A lawful permanent resident* [Emphasis added].

The Claimant provided credible evidence (i.e. a stamped passport) indicating that she was originally admitted to the U.S. on [REDACTED], 2000 (Ex. C-1). However, pursuant to Adult Public Assistance Manual Section 421-2, the five year bar period does not run from the date of an applicant's mere physical entry into the United States. Rather, pursuant to Manual Section 421-2, the five year bar period only begins to run from the date an applicant becomes a "lawful permanent resident."

Pursuant to established federal immigration law, a person does not become a lawful permanent resident" until he or she qualifies to obtain a Permanent Resident Card. See Discussion in Principles of Law, above, Section II at pages 4-5. The Claimant did not receive her Permanent Resident Card until May 7, 2009 (Ex. C-3).

In summary, the Claimant physically entered the United States in 2000. However, pursuant to Adult Public Assistance Manual Section 421-2, the five year bar period does not run from the date of an applicant's physical entry into the United States, but rather from the date an applicant becomes a *lawful permanent resident*. The evidence is clear that the Claimant did not receive her Permanent Resident Card, and thus become a *lawful permanent resident*, until [REDACTED] 2009.

The Claimant applied for APA benefits in June 2010 (Ex. 2.0). This was only eleven months after the Claimant had become a *lawful permanent resident* of the United States. Accordingly, at the time she submitted her application, the Claimant did not satisfy the requirement that she have resided in the United States as a lawful permanent resident for at least five (5) years. The Division was therefore correct when, on July 2, 2010, it denied the Claimant's June 28, 2010 application for Adult Public Assistance because the Claimant did not satisfy the five (5) year requirement.

II. Analysis Under The Medicaid Program.

Pursuant to state Medicaid regulation 7 AAC 100.400(a)(2) and Adult Disabled and Long Term Care Medicaid Manual Section 520-B, the Division uses the same criteria in determining applicability of the "five year rule" in Medicaid cases as it does in Adult Public Assistance cases Ex. 11). Accordingly, the Division was also correct when, on July 2, 2010, it denied the Claimant's June 28, 2010 application for APA-related Medicaid benefits, because the Claimant had not yet resided in the United States as a *lawful permanent resident* for at least five (5) years.

CONCLUSIONS OF LAW

1. Pursuant to Adult Public Assistance Manual Section 421-2, for APA purposes the five year bar period does not run from the date of an applicant's physical entry into the United States, but rather from the date an applicant becomes a *lawful permanent resident*.
2. Pursuant to Adult Disabled and Long Term Care Medicaid Manual Section 520-B, for APA-related Medicaid purposes the five year bar period does not run from the date of an applicant's physical entry into the United States, but rather from the date an applicant becomes a *lawful permanent resident*.
3. Pursuant to applicable federal immigration law, an individual does not become a "*lawful permanent resident*" of the United States until they have qualified for a Permanent Residence Card. The Claimant did not qualify for her Permanent Residence Card until 2009.
4. The Division was therefore correct when, on July 2, 2010, it denied the Claimant's June 28, 2010 application for Adult Public Assistance and APA-related Medicaid benefits, because, at that time the Claimant had not yet been a "*lawful permanent resident*" of the United States for at least five (5) years.

DECISION

The Division was correct when, on July 2, 2010, it denied the Claimant's June 28, 2010 application for Adult Public Assistance and APA-related Medicaid benefits, because, at that time the Claimant had not yet been a "*lawful permanent resident*" of the United States for at least five (5) years.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, the Claimant must send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

An appeal request must be sent within 15 days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision.

DATED this 1st day of November, 2010.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 1st day of November 2010 true and correct copies of the foregoing document were sent to the Claimant via U.S.P.S. Mail, and to the remainder of the service list by e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested
[REDACTED], DPA Hearing Representative

[REDACTED], Director, Division of Public Assistance
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training
[REDACTED], Chief of Field Services
[REDACTED], Administrative Assistant II
[REDACTED], Eligibility Technician I

(signed)

J. Albert Levitre, Jr.
Law Office Assistant I