BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
	)	
N T-O	)	OAH No. 15-1412-APA
	)	Agency No.

DECISION

I. Introduction

The Division of Public Assistance notified N T-O that it was closing his Adult Public Assistance and Medicaid case and "coding him out of" his family's Food Stamps case on the basis that his immigration status did not satisfy the "qualified alien" eligibility requirements for those programs. Mr. T-O filed an appeal. After a full hearing and upon a careful review of the evidence, this decision concludes that the existence of a final, non-appealable, and legally enforceable order of removal precludes Mr. T-O from being considered a "qualified alien" for purposes of the benefit programs he seeks to utilize. Accordingly, the Division's decision is affirmed.

II. Factual and Procedural History

N T-O is a citizen of Cuba who entered the United States in 1980 as part of the "Mariel Boatlift."[1] He was "paroled" into the United States as an "Asylum Applicant."[2]

His parole was later revoked on December 19, 1983, following convictions in 1982 for possession of marijuana and for assaulting a peace officer.[3]

Mr. T's asylum application was denied on January 10, 1984.[4] In February 1984, an immigration judge ordered him deported.[5] On December 19, 1984, the Board of Immigration Appeals issued an Order finding Mr. T-O to be "excludable" from the United States on three separate bases – the two 1982 convictions, and a "crime of moral turpitude" (theft) while he was still living in Cuba.[6] The Board of Immigration Appeals therefore upheld the order for deportation.[7]

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1 Ex. 7; Ex. 27.1-27.2; Testimony of Mr. T-O; Testimony of Mr. Brady.
2 Ex. 25, 27.1-27.2.
3 Ex. 7.
4 Ex. 27.2.
5 Ex. 7.2-7.4; Ex. 27.2.
6 Ex. 7-7.1. Mr. T-O served three years of a thirty year sentence "before being released for the purpose of joining the Cuban boat lift." Ex. 7.1.
7 Ex. 7-7.1; Ex. 8; Ex. 27.2.

Since at least April 25, 2003, Mr. T-O has been the subject of an Order of Supervision governing his continued presence in the United States pending his eventual deportation to Cuba.[8] On June 30, 2009, DHS issued a Warrant of Removal/Deportation for Mr. T-O "based upon a final order by the Board of Immigration Appeals."[9] A new Order of Supervision was issued March 30, 2013, setting out various requirements that Mr. T-O must follow "until such time as [his] removal to Cuba can be effected."[10]

While living in Alaska Mr. T-O has received various public benefits, including Food Stamps, Adult Public Assistance (APA), and Medicaid.[11] Division records reflect that by October 2015, the Division had become concerned about Mr. T-O's eligibility for public benefits.[12]

On October 15, 2015, the Division issued notices to Mr. T-O terminating his APA and Medicaid benefits effective October 31, 2015, and his Food Stamps benefits effective November 1, 2015.[13] The APA/Medicaid notice provided the following justification for the decision to close Mr. T-O's case: "We received verification that you are not living legally in the United States and haven't been since 1984. As a result, you are not eligible for this program since you are not a qualified alien."[14] The notice further indicated that "[t]his action is supported by APA N section 421-5."[15]

The Food Stamp notice indicated the Division was changing the amount of Mr. T-O's family's food stamp benefits effective November 2015, and provided the following justification: "We received verification that N is not living legally in the United States and hasn't been since 1984. As a result, N is not eligible for this program since he is not a qualified alien."[16] The notice further indicated that "[t]his action is based on Food Stamp N Section 602-1(D)."[17]

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8 Ex. 8.2. See generally, *Zadvyas v. Davis*, 533 U.S. 678 (2001). According to ICE Special Agent Brady, Mr. T-O was one of the relatively small number of Cuban citizens in whose cases the Cuban government had, following an order of deportation, agreed to issue travel documents allowing their return to Cuba. However, the Department of Homeland Security delayed enforcement of the order due to threats by Mr. T-O to bring his minor children, who are U.S. citizens, with him to Cuba. Testimony of Mr. Brady.

9 Ex. 6.

10 Ex. 8-8.1, 8.3-8.7. Mr. T-O has reported quarterly to DHS in person as required by that Order. Ex. 8.7.

11 Ex. 1-1.1.

12 Ex. 2-2.2.

13 Ex. 5; Ex. 5.2.

14 Ex. 5.

15 Ex. 5.

16 Ex. 5.2.

17 Ex. 5.2.

Mr. T-O filed an appeal of both decisions. On his Fair Hearing request, he identified his "reason for fair hearing request" as "1980 Cuban Refugees," providing a social security number and an immigration case number.[18]

A hearing was held on November 19, 2015, with the assistance of a Spanish language interpreter. Mr. T-O participated in person, assisted at various times by his daughter, S T-O, and his pastor, M R. Mr. T-O testified but called no additional witnesses. The Division was represented by Jeff Miller. Special Agent Timothy Brady from the Department of Homeland Security, Immigration & Customs Enforcement testified on behalf of the Division. All exhibits provided by the parties were received into evidence, including four pages of documents that Mr. T-O provided to the Division prior to the hearing.

Following the hearing, the record was held open for several weeks for the parties to submit briefing on the issue of how Mr. T-O's immigration history and status impacted his current eligibility for public assistance benefits. The Division's December 14, 2015 post-hearing briefing included additional exhibits and an affidavit from Special Agent Brady addressing questions about the specifics of Mr. T-O's immigration status. The record was then held open to allow Mr. T-O to respond to the information presented with the Division's post-hearing brief. The record closed without further submissions from any party.

III. Discussion

There are two issues in this case: (1) Whether the Division's notice is legally adequate, and (2) whether the benefits in question should be terminated. The Division has the burden of proof because it is seeking to terminate Mr. T-O's benefits.[19]

A. Adequacy of Notice

A notice terminating public assistance benefits must be sent to the recipient no "later than 10 days before the date the department intends to take action."[20] The notice must contain "the reasons for the proposed action, including the statute, regulation, or policy upon which that action is based."[21]

With regard to the APA and Medicaid benefits, the Division issued a notice on October 15, 2015, and terminated Mr. T-O's benefits on October 31, 2015. The Notice

[18] Ex. 5.1; Ex. 5.3.
[19] 7 AAC 49.135.
[20] 7 AAC 49.060.
[21] 7 AAC 49.070.

informed Mr. T-O that his APA and Medicaid case was closed based on a determination that he was living in the United States illegally, and therefore was "not eligible for this program because [he is] not a qualified alien." It then referred him to APA N Section 421-5.[22]

The notice regarding the Food Stamp benefits was also issued on October 15, 2015, and changed the amount of the family benefits as of November 1, 2015. Like the notice regarding APA and Medicaid benefits, the Notice informed Mr. T-O that it was taking this action based on having determined he was "not a qualified alien." The Notice referred Mr. T-O to Section 602-1(D) of the Food Stamp N.[23]

Both notices complied with the 10-day requirement and were sufficient to put Mr. T-O on notice of both the underlying factual basis for the agency's action, and the policy basis supporting that action. Accordingly, the Division complied with the applicable notice requirements.

B. Termination of Benefits

The second question is the substantive issue of whether the Division was correct in determining that Mr. T-O's immigration status renders him ineligible for the benefits in question. The Division deemed Mr. T-O ineligible based on a determination that he is not a qualified alien.[24] Mr. T-O's appeal request indicates that he is disputing the Division's decision based on his status as a "1980 Cuban Refugee."[25] The question then is whether Mr. T-O's status falls within the definition of "qualified alien" for purposes of the benefits programs he seeks to utilize.

All three of the benefit programs at issue in this appeal include a requirement that the recipient be either a U.S. citizen or a "qualified alien" as defined in federal law.[26] The APA and Alaska Medicaid regulations incorporate the definition of "qualified alien" found in 8 U.S.C. § 1641.[27] That statute provides a list of alien statuses that can form the basis for being a "qualified alien." Of relevance to this inquiry is Section 1641(b)(7), which provides: "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 – an alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980)."

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22 Ex. 3.
23 Ex. 3.1
24 Ex. 5, 5.2.
25 Ex. 5.1, 5.3.
26 AS 47.25.430(f); 7 AAC 40.090(a); 7 AAC 40.110(a); 7 AAC 100.050(a); 8 U.S.C. §§ 1611; Ex. 9-9.1 (APA N §§ 421, 421-2); 19 (Food Stamp N § 602-1D).
27 AS 47.25.430(f); 7 AAC 100.052(b)(1).

This same category of "qualified alien" is used by the Food Stamp program, which includes in the definition of qualified alien "someone who, at the time of application, is . . . an alien who is a Cuban and Haitian entrant as defined in 501(e) of the Refugee Education Assistance Act of 1980."[28]

Thus, the inquiry into whether Mr. T-O is a "qualified alien" for purposes of all three programs turns on whether he is a "Cuban Entrant as defined by Section 501(e) of the Refugee Education Assistance Act of 1980."[29] Section 501(e) identifies two separate circumstances under which a Cuban national is considered a "Cuban Entrant." First, under Section 501(e)(1), a "Cuban and Haitian entrant" is:

> Any alien granted parole status as a Cuban/Haitian Entrant (Status Pending) or granted any other special status subsequently established under the immigration laws for nationals of Cuba or Haiti, regardless of the status of the individual at the time assistance or services are provided.

For individuals never granted parole status as Cuban/Haitian Entrant (Status Pending), Section 501(e)(2) defines a "Cuban and Haitian entrant" to mean:

> [A]ny other national of Cuba or Haiti (A) who (i) was paroled into the United States and has not acquired any other status under the Immigration and Nationality Act; (ii) is the subject of removal proceedings under the Immigration and Nationality Act; or (iii) has an application for asylum pending with the Immigration and Naturalization Service; and (B) with respect to whom a final, nonappealable, and legally enforceable order of removal has not been entered.

Here, Mr. T-O was not "granted parole status as a Cuban/Haitian Entrant (Status Pending)."[30] Accordingly, Section 501(e)(1) does not apply to him. Rather, Mr. T-O was granted parole status as an asylum applicant.[31] Accordingly, his Cuban Entrant status arises, if at all, from Section 501(e)(2). Under that provision, however, Mr. T-O lost his status as a "Cuban and Haitian entrant" when "a final, nonappealable, and legally enforceable order of removal" was entered against him.[32]

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[28] Ex. 19 (Food Stamp N 602-1(D)(2)(d)).

[29] Mr. T-O did not argue and does not appear to contend that there is any other aspect of his immigration status that renders him a qualified entrant.

[30] Ex. 25; Ex. 27.2, Ex. 28.7.

[31] Ex. 25; Ex. 27.1-27.2.

[32] Of note, "Cuban/Haitian entrant" status under 501(e)(1) appears to be irrevocable under that section, which provides that an individual granted parole status as "Cuban Entrant – Status Pending" remains a "Cuban Entrant," "regardless of the status of the individual at the time assistance or services are provided." Section 501(e)(2), on the other hand, expressly limits the definition of "Cuban Entrant" to those otherwise qualifying individuals "with respect to whom a final, nonappealable, and legally enforceable order of removal has not been entered." Because Mr. T-O

Mr. T-O's sole identified basis for his appeal was his status as a "Cuban refugee." For the reasons described above, however, he is not a Cuban Entrant for purposes for Section 501(e). Accordingly, Mr. T-O does not satisfy the requirements to be a "qualified alien" under the "Cuban Entrant" category for purposes of public assistance benefits. Mr. T-O has identified no other basis upon which he can overcome the Division's finding that he is not a qualified alien.

Mr. T-O believes that he should receive public assistance benefits because he needs them, and because he has worked in the United States and contributed to its economy. The Division did not dispute Mr. T-O's financial or medical needs. But the Division is required to follow the eligibility regulations as they are written, and neither the Division nor the Office of Administrative Hearings has the authority to create exceptions to those regulations.[33] Under the program regulations, individuals who are neither citizens nor qualified aliens are not eligible for Adult Public Assistance, Medicaid or Food Stamp benefits. Because he is not a qualified alien, Mr. T-O is not eligible for these benefits.

IV. Conclusion

Mr. T-O is not a qualified alien for purposes of Food Stamps, Adult Public Assistance or Alaska Medicaid eligibility. Accordingly, the Division was correct to discontinue his benefits under those programs. The Division's decision is therefore AFFIRMED.

DATED: December 30, 2015.

By: *Signed*
Cheryl Mandala
Administrative Law Judge

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qualified as a Cuban Entrant under Section 501(e)(2), rather than under Section 501(e)(1), he then lost his "Cuban Entrant" status upon entry of the "final, nonappealable, and legally enforceable order of removal."

[33] *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010) ("Administrative agencies are bound by their regulations just as the public is bound by them"); 7 AAC 49.170 (limits of the hearing authority).

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 9th day of February, 2016.

By: *Signed*
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

[This document has been modified to conform to the technical standards for publication.]