

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF REVENUE**

IN THE MATTER OF

D.W. and her child J.B.L.

Case No. OAH 05-0067-PFD

2004 Permanent Fund Dividend

DECISION & ORDER

I. Introduction

D.W. timely applied for 2004 permanent fund dividends for herself and on behalf of her child J.L. The Permanent Fund Dividend Division determined that the applicants were not eligible, and it denied the applications initially and at the informal appeal level. Ms. W. requested a formal hearing by written correspondence. The administrative law judge affirms the division's decision.

II. Facts

As citizens of Colombia, Ms. W. and her child came to the United States in 2002, entering with tourist visas. On November 23, 2002, Ms. W. married G.W., a U.S. citizen and Alaska resident, in Soldotna. In January of 2003 Ms. W. mailed an application for permanent resident status to the U.S. Immigration and Naturalization Service. The INS received the application on February 20, 2003, and granted Ms. W. and her child permanent resident status on June 11, 2003.

III. Discussion

In order to qualify for a permanent fund dividend, the applicant must be a U.S. citizen, an alien lawfully admitted for permanent residence in the United States, an alien with refugee status, or an alien who has been granted asylum.¹ There is no dispute that at the time they applied for 2004 dividends, Ms. W. and her child been admitted for permanent residence in the United States. In addition to the above rule, PFD applicants must also have been Alaska residents all through the qualifying year, which in this case was 2003.² The determination of whether an alien is a state resident is governed by 15 A A C 23.154, which reads, in relevant part, as follows:

¹ AS 43.23.005(a)(5).

² AS 43.23.005(a)(3).

(a) The department will consider an alien to be lawfully admitted for permanent residence if the alien provides verification that the alien has been assigned a status under 8 U.S.C. 1101 - 1189 (Immigration and Nationality Act) that allows the alien to adopt the United States as the alien's domicile, including the following statuses:

(1) status as an immigrant within the meaning of 8 U.S.C. 1101(a)(15), as verified by the USCIS;

(2) status as a nonimmigrant within the meaning of 8 U.S.C. 1101(a)(15), as verified by the USCIS, if that status does not require the alien to declare that the alien has a residence in a country other than the United States;

(3) indefinite parole into the United States under 8 U.S.C. 1182(d)(5), as verified by the USCIS;

(4) a status described in 8 U.S.C. 1186a (Conditional Permanent Resident Status for Certain Alien Spouses and Sons and Daughters) or 8 U.S.C. 1186b (Conditional Permanent Resident Status for Certain Alien Entrepreneurs, Spouses, and Children), as verified by the USCIS.

(b) The department will not consider an alien to be lawfully admitted for permanent residence if the USCIS assigns the alien a status that requires the alien to declare that the alien has a residence in a country other than the United States.

(c) The department will consider an alien to be a state resident for purposes of AS 43.23.005 (a)(3) on the date that the alien can demonstrate, to the satisfaction of the department, that the alien has formed the intent to remain indefinitely under the requirements of AS 43.23 and this chapter. The qualifying year for dividend eligibility for an alien who is a state resident begins on January 1 of the calendar year after the date the alien is lawfully admitted for permanent residence in the United States under this chapter, granted asylum under 8 U.S.C. 1158, or granted refugee status under 8 U.S.C. 1157 or 8 U.S.C. 1159.

(d) If an alien may adopt the United States as the alien's domicile, but has been assigned, under 8 U.S.C. 1101 - 1189 (Immigration and Nationality Act), a nonimmigrant status allowing only a limited stay in the United States, the department will not consider the alien to be a resident under AS 43.23.005 (a)(3) and this section, unless the department finds that the alien has taken a significant step to convert or adjust to a permanent or indefinite status. A significant step includes the filing of a petition or application with the USCIS.

(e) An alien seeking eligibility under this section has the burden of proving that on the date of the dividend application the alien was lawfully admitted for permanent residence as described in (a) of this section, granted asylum under 8 U.S.C. 1158, or granted refugee status under 8 U.S.C. 1157 or 8 U.S.C. 1159.

At the beginning of the qualifying year, Ms. W.'s immigration status in the United States was that of a tourist. Although she had married a U.S. citizen and probably would have been

granted permanent resident status in 2002 if she had applied for it, at the beginning of 2003 Ms. W. had not been assigned a status under 8 U.S.C. 1101 -1189 (Immigration and Nationality Act) that would allow an alien to adopt the United States her domicile. In looking at subparagraph (a) of 15 A A C 23.154 above, Ms. W. does not fall into any of the categories that can be regarded as a permanent resident status. Subparagraph (c) makes clear that Ms. W.'s first qualifying year cannot begin until January 1 of the year after she was granted permanent resident status. Ms. W. was admitted for permanent residence in the U.S. in 2003. Thus, her first qualifying year would be 2004, and the first dividend she could qualify for would be the 2005 dividend.

There was some discussion in earlier pleadings in this case about a "significant step" towards permanent resident status, and unfortunately an interim order I issued may have caused additional confusion. Federal immigration law is complex, and there are dozens of potential categories of aliens. Some of these immigration statuses, though not admissions for "permanent residence status," nevertheless do allow the alien to adopt the U.S. as the person's domicile. In these cases, the Alaska Supreme Court has said the division must look beyond the "permanent residence" label to determine whether the applicant has an immigration status that would permit and indefinite stay in the United States. To that end, the department has adopted subsection (d) above, which calls for an examination of whether the applicant has taken a "significant step." Under federal law, surprisingly, a fiance visa is technically a nonimmigrant visa. Someone holding such a visa, however, may show intent to become a citizen, and I issued the interim order in this case to see if there was some immigration information not in the file that would make Ms. W. eligible. As a person holding only a tourist visa at the beginning of 2003, Ms. W. did not have an immigration status that would permit her to remain in the United States indefinitely.

I do not doubt Ms. W.'s honesty or her subjective intent to remain in Alaska. However, the PFD laws contain a number of bright-line rules that cannot be waived. A foreign national who is in the United States with a temporary immigration status, such as a tourist visa, cannot technically be considered an Alaska resident until obtaining an immigration status that would allow the person to remain in the United States indefinitely. This rule may seem somewhat harsh in Ms. W.'s case, as she seems to have formed a subjective intent to stay in Alaska, and once married to a citizen, she had a perfectly legal avenue towards becoming a permanent resident. But laws must be applied uniformly to all applicants, and Ms. W.'s case cannot be

distinguished from other cases where applications have been denied to other people for the same reason.

IV. Conclusion

Ms. W. did not have an immigration status that permitted her to form the intent to remain in Alaska indefinitely until after the beginning of the 2003 qualifying year, and therefore cannot qualify for a dividend until 2005. The division's decision to deny the applications of Ms. W. and her child should be affirmed.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the applications of D.W. and her child J.L. 2004 permanent fund dividends be AFFIRMED.

DATED this 23rd day of February, 2006.

By: DALE WHITNEY
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010.1, Dale Whitney, Administrative Law Judge, on behalf of the Commissioner of Revenue, order that this decision and order relating to the eligibility of D.W. and her child J.L. 2004 permanent fund dividends be adopted and entered in their file as the final administrative determination in this appeal.

Reconsideration of this decision may be obtained by filing a written motion for reconsideration within 10 days after the date of this decision, pursuant to 15 A A C 05.035(a). The motion must state specific grounds for relief, and, if mailed, should be addressed to: Commissioner's Office Appeals (Reconsideration), Alaska Department of Revenue, P.O. Box 110400, Juneau, Alaska 99811-0400.

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

DATED this 22nd day of February, 2006.

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

By: DALE WHITNEY
Administrative Law Judge

Case Parties 2/23/06