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

IN THE MATTER OF:

C.P.

Case No. OAH 05-0358-PFD

2004 Permanent Fund Dividend

DECISION & ORDER

I. Introduction

C.P. timely applied for a 2004 permanent fund dividend. The Permanent Fund Dividend Division determined that Ms. P. was not eligible, and it denied the application initially and at the informal appeal level. Ms. P. requested a formal hearing by written correspondence. After reviewing the record, Administrative Law Judge Dale Whitney affirms the division's decision.

II. Facts

The facts in this case are not in dispute. Ms. P. met her current husband, P.P., while they were attending school in Idaho. Mr. P. is a long-time Alaska resident; Ms. P. is from Brazil. Currently, the couple lives in Wasilla.

The qualifying year for a 2004 dividend is 2003. At the beginning of 2003, Ms. P. was in the United States as a nonresident with an H-1B immigration status. H-1B is one of the so-called "dual intent" immigration statuses. This category is for workers in specialty occupations, and it allows the person to be in the United States for only a limited time. But it varies from some other temporary statuses in that a person holding H-1B status is free to seek permanent residence in the United States without penalty. For many people seeking to remain in the United States, achieving H-1B status is the major hurdle to overcome. Though situations vary, converting to permanent resident status after achieving H-1B status is usually a matter of meeting achievable eligibility requirements and filing the correct forms before the expiration of the applicable deadlines.

While H-1B aliens may pursue permanent resident status, not all of them do. For a foreign professional who wanted to gain experience working in the United States for a limited time, H-1B would be the correct status for this kind of limited stay in the country. Ms. P. did not file a petition for a "green card," or permanent resident status, with United States Citizenship and Immigration Service (USCIS) until some time in 2004.

III. Discussion

The regulation addressing eligibility of aliens for a PFD is 15 A A C 23.154(d), which reads:

> If an alien may adopt the United States as the alien's domicile, but has been assigned, under 11 USC 1101-11 USC 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.

This regulation was adopted in the wake of the Supreme Court's decision in *State, Dept. of Revenue v. Andrade,* 23 P.3d 58 (Alaska 2001). In *Andrade,* the court determined that the phrase "lawfully admitted for permanent residence in the United States" does not mean the same thing in federal immigration laws that it does in AS 43.23.005(a), the PFD eligibility statute. Under the federal definition of the phrase, a person who holds H-1B status is not "lawfully admitted for permanent residence in the United States," but the person has been cleared to take additional steps to become lawfully admitted for permanent resident status. For aliens who know they meet the federal requirements for immigration, the additional steps are usually mere formalities. If the alien meets other requirements for immigration, such as a lack of felony convictions, the person can properly form the intent to remain in the United States forever.

Under the Alaska statute, AS 43.23.005(a)(5), a person has been "lawfully admitted for permanent residence in the United States" if the person can form the intent to remain in Alaska indefinitely and make a home in the state. Thus, if a person has attained a status such as H-1B and meets other immigration requirements, the person has been lawfully admitted for permanent residence even if the person has not begun the formalities necessary to become a permanent resident under the federal definition. The *Andrade* court found that Congress intended aliens who could choose to remain in the country indefinitely to be treated the same as permanent residents in the country, even if they had yet to take steps such as petitioning for official permanent residence status. The court therefore concluded that it would be a violation of the Supremacy Clause for the State of Alaska to deny benefits to these aliens that are available to citizens and other resident aliens.

The regulation quoted above, 15 A A C 23.154(d), recognizes the existence of "dual-intent" immigration statuses under federal immigration law. The phrase, "an alien [who] may adopt the United States as the alien's domicile, but has been assigned, under 11 USC 1101 - 11 USC 1189 (Immigration and Nationality Act), a nonimmigrant status allowing only a limited stay in the United

States" precisely defines Ms. P.'s situation at the beginning of 2003. Ms. P. had the legal ability to adopt Alaska as her domicile, although her immigration status at the time allowed only a limited stay in the country.

Although she had the legal ability to form the intent to remain in the county permanently, Ms. P. needed to take some further step beyond just having H-1B status before she could do so. The regulation appears designed to separate applicants in this status who intend to remain in the United States from those who do not. Recognizing that such applicants could stay in the United States, the regulation requires them to have taken some kind of "significant step to convert or adjust to a permanent or indefinite status" before they can qualify for a dividend. The "significant step" specifically may include filing a petition or application with the USCIS to convert to permanent resident status, but the regulation does not preclude consideration of other actions that could be regarded as a significant step towards permanent resident status.

Ms. P. argues that the regulation violates AS 43.23.005(a)(5) as it was interpreted by the *Andrade* court. She writes, "The Department's adoption of 15 A A C 23.154(d) after the decision laid out in the case is clearly inconsistent with the Supreme Court of Alaska's interpretation of the statute. In many circumstances, it would appear to function well, but in many others it clearly promotes an injustice to certain applicants." Describing how the regulation applies to Ms. P.'s particular case, her husband writes,

> I am a nearly lifelong Alaska resident of 26 years, and C. and I have been legally husband and wife since 2003. Her entire intent when she established her Alaskan Residency on 12/17/2002 was to live with me indefinitely in Alaska. At the time, we had been engaged to be married for quite a while, as I had originally met her as a college student in Idaho. However, as a young man just recently out of school, I did not have financial resources to sponsor her with an affidavit of support. My income did not meet the 125% poverty level requirements threshold the federal government requires to sponsor an immigrant family member. As a result, the H-1B program was our only option to stay together in our desired location, Alaska, while I developed the income history needed under federal law.

After quoting the regulation, Mr. P. writes,

> In this specific section, no mention is even made to whether or not an alien is even eligible for the permanent or indefinite status, only that a petition or application be filed. Under the department's logic, C. and I could have spent more than $300 to file an application for a green card and been subsequently denied because I didn't earn more than 125% of the poverty level at the time. However, even though she wouldn't have been eligible for the status, the mere filing of the petition would have been enough in the Department's eyes to grant the approval of her 2004 dividend application. This is clearly absurd and deserves to be looked at again. In this regard the Department is discriminating against us because of my

income level, and because we refused to waste money on an application until we were eligible for it to be approved.

Mr. P. is incorrect that the regulation does not mention whether an alien is eligible for permanent or indefinite status. The language, "an alien [who] may adopt the United States as the alien's domicile" perfectly describes an alien who is eligible for permanent or indefinite status. Only an alien who is eligible for permanent or indefinite status may adopt the United States as her domicile. There is no dispute that Ms. P. could have adopted the U.S. and Alaska as her domicile at the beginning of the qualifying year.

The regulation is designed to exclude from PFD eligibility aliens with a dual-intent status who do not intend to remain in the country, and Ms. P. concedes that "in many circumstances, it would appear to function well." Ms. P. argues that because the regulation does not appear to have produced its intended effect in her case, it exceeds the authority that the legislature has granted to the department.

In *Church v. State,*[1] the Alaska Supreme Court said,

> We have held that AS 43.23.015(a), the statute concerning proof of eligibility for PFDs, authorizes "and require[s] the Commissioner of the Department of Revenue to promulgate regulations defining substantive eligibility requirements for PFDs." *State, Dep't of Revenue* v. *Bradley,* 896 P.2d 237, 239 (Alaska 1995)(citing *Cosio,* 858 P.2d at 624-25). *Cosio* held that a regulation can "exclud[e] permanent fund dividend applicants who arguably fall within the statutory definition of eligible applicants," as long as the exclusion is consistent with the statutory purpose and is not unreasonable or arbitrary. *Id.* at 625. *In Brodigan* v. *Alaska Dep't of Revenue,* 900 P.2d 728, 732 (Alaska 1995), we held that 15 A A C 23.42.175(c)(6), which denies PFDs to seasonal residents, was not beyond the authority of the commissioner to promulgate and that the regulation was consistent with the purpose of AS 43.23.095(8), which is "to limit payment of dividends to permanent residents." *Id.* The *Brodigan* opinion also stated that a legitimate purpose of the regulation was to "ease the administrative burden of attempting to determine what treatment level is sufficient to merit eligibility for a PFD."

Ms. P. is thus incorrect in the assertion that PFD regulations may not impose substantive eligibility criteria beyond those contained in statutes. Even if the regulation does not separate residents from nonresidents with complete accuracy in every case, it is legitimate so long is it is not unreasonable or arbitrary. In this sense, the regulation is not unlike other regulations that automatically exclude from PFD eligibility applicants who have registered to vote in another state, or purchased a resident fishing license in another state. Other regulations create presumptions that

[1] *Church v. State, Dept. of Revenue,* 973 P 2d 1125 (Alaska 1999).
[2] 15 A A C 23.143(d)(12),(14).

people are no longer Alaska residents if they have been out of the state for a certain length of time, or have not returned to the state frequently.[3] In each case, the particular action might not accurately separate residents from nonresidents in every case. But the rules provide efficient, predictable results that can be uniformly applied without a time-consuming probe of the applicant's subjective intent.

The requirement that holders of "dual intent" status take a significant step toward permanent residence before they can be considered eligible for PFDs is a test that is rationally related to ensuring that only residents receive dividends. The test is also rationally related to administrative economy and streamlining of the application process. While the P.'s may not have been able to afford filing a petition to the USCIS (admittedly a futile act in their particular case), the test is not unduly burdensome. It does not require that the petition or application be approved, and there are a number of acts, such as application to the Department of Labor for an Alien Labor Certification for Permanent Employment, that could be regarded as a significant step. While not a perfect test, the significant step requirement does have the advantage of being efficient, fair, and predictable; applicants who can show such a step qualify, those who cannot are ineligible.

IV. Conclusion

At the beginning of 2003 Ms. P. had the legal ability to adopt the United States as her domicile, but she had been assigned a nonimmigrant status allowing only a limited stay in the United States. At the beginning of 2003 Ms. P. had not taken a significant step to convert or adjust to a permanent status. The division correctly applied the law when it made the decision to deny Ms. P.'s application for a 2004 dividend. The regulation the division applied had been adopted within the scope of the commissioner's authority, and it does not impermissibly conflict with any statute or Supreme Court decision.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of C.P. for a 2004 permanent fund dividend be AFFIRMED.

DATED this 3rd day of January, 2006.

By: DALE WHITNEY
Administrative Law Judge

[3] 15 AAC 23.163(f); 15 AAC 23.163(h)(2).

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 C.P. for a 2004 permanent fund dividend be adopted and entered in his 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 3rd day of January, 2006

By: DALE WHITNEY
Administrative Law Judge

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

Case Parties
1/3/06