

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

In the Matter of)	
)	
E. R. and)	
MINOR CHILDREN: A. O.,)	
B. O., & C. G.)	
)	OAH No. 07-0125-PFD
<u>2006 Permanent Fund Dividends</u>)	

Introduction

E. R. timely submitted 2006 Permanent Fund Dividend (PFD) applications for herself and her three minor children.¹ The division denied her application initially and at the informal appeal stage because it determined that Ms. R. was not a state resident because she had not taken a “significant step” to convert or adjust to a permanent or indefinite status in accordance with 15 AAC 23.154(d).² Denial of Ms. R.’s application resulted in denial of her children’s applications because they no longer had an eligible sponsor.

Ms. R. timely requested a formal appeal for herself and her minor children. A hearing was held at the Office of Administrative Hearings on April 18, 2007. At hearing Ms. R. was represented by Goriune Dudukgain of the Northern Justice Project. Ms. R. presented the testimony of immigration attorney Robin Bronen³ and herself. PFD Specialist Susan Lutz represented the division. A preponderance of the evidence shows that the applicants are eligible for 2006 dividends.

I. Summary of the Evidence

The facts in this case are undisputed. Ms. R. and her children are from Mexico. They are not United States citizens. They have been in Alaska since 2004. Ms. R. first applied for a PFD for herself and her children in 2006. In response to the question “Are you a United States citizen?” she answered “No.” The application requires a person who is not a U.S. citizen provide

¹ Ms. R. is her children’s PFD sponsor. If Ms. R.’s appeal is not granted, the children will not have an eligible sponsor and their applications are subject to denial. However, the children may be able to find a substitute sponsor under 15 AAC 23.113(i) or may be able to apply later under 15 AAC 23.133(b), since no application has yet to be filed by an “eligible” sponsor. Because the children’s eligibility is contingent upon their mother’s eligibility, this decision will focus on Ms. R.’s appeal.

² This was the only basis for denial. Therefore, if she is determined to be a State resident for purposes of PFD eligibility, she will be entitled to a 2006 PFD.

³ Ms. Bronen is assisting Ms. R. with her U visa application.

an alien registration number and their legal immigration status. In response Ms. R. provided a copy of her March 17, 2005 through March 17, 2006 employment authorization card.

The division wrote Ms. R. requesting a copy of her Alien Registration Card, a copy of an I-485 application or any other documentation she may have submitted to the U.S. Citizenship and Immigration Service (USCIS) requesting a change in her immigration status. Ms. R. responded by sending photocopies of her employment authorization cards for 2004, 2005, & 2006. The division denied her application because Ms. R. did not provide proof that she met the definition of “state resident” under AS 43.23.005(a)(3).

Ms. R. informally appealed, arguing that under *State v. Andrade*, 23 P.3d 58, 68-69 (Alaska 2001), she was a state resident because she could legally form the intent to remain in Alaska on an indefinite basis.⁴ Ms. R. explained that she has submitted an Early U visa Application/Interim Relief Request. She is awaiting the promulgation of regulations by the Department of Homeland Security that will allow her to receive U-nonimmigrant status under § 101(a)(15)(U) (a U visa) of the Immigration and Nationality Act (INA)⁵. Until regulations are in place, the USCIS has placed her in deferred action status.⁶ Ms. R. believes that having been granted deferred action status allows her, as a practical matter, to stay indefinitely in the United States.⁷ The division considered Ms. R.’s arguments and again concluded that she had not provided evidence of taking a significant step to convert or adjust her immigration status.⁸

Ms. Bronen testified regarding the history and purpose of U nonimmigrant status under §101(a)(15)(U) of the INA. On October 28, 2000, Congress passed the Victims of Trafficking and Violence Protection Act.⁹ With the passage of this act, Congress created the U nonimmigrant classification. The U-nonimmigrant status is intended to encourage victims of certain crimes to report and assist law enforcement agencies in their fight against criminal activities of which aliens are victims, while offering protection to the victims. “U” status can provide an immigration mechanism whereby cooperating victims can legally remain in the United States to assist law enforcement in these investigations or prosecutions and become a citizen.

⁴ Exhibit 5 p. 2.

⁵ 8 USC § 1101- 1189.

⁶ Exhibit 5 p. 3

⁷ Exhibit 5 p. 3.

⁸ Exhibit 6 p. 2.

⁹ Pub. L. 106-386.

The statutory scheme for the U visa provides that an applicant must meet certain statutory requirements to qualify. The first requirement is to obtain certification from law enforcement, a prosecutor, or a judge that the immigrant victim “has been helpful, is being helpful, or is likely to be helpful”¹⁰ in the investigation of certain criminal activities set forth in the Act. Once the certification is received, the statute contemplates the certification paperwork will be submitted to the USCIS as part of the application for a U visa.¹¹ If the U visa is approved, the immigrant is considered a lawful temporary resident for a period not to exceed three years. By statute, a U visa holder will be permitted to live and work legally in the U.S. for the duration of the U visa. Up to 10,000 U visas will be issued annually.

Unfortunately, the department of Homeland Security has yet to promulgate regulations implementing §101(a)(15)(U). Without regulations, U visas cannot be issued. In the interim, the USCIS has directed that no one who appears to be eligible to apply for U-nonimmigrant status be removed from the United States until he or she has had the opportunity to avail him/herself of the provisions of the Act.¹² The USCIS has determined that until regulations are adopted, it will use existing mechanisms (parole, deferred action, and stays of removal) to achieve this goal.¹³

The USCIS assesses an individual’s early U visa application to determine whether the applicant has met the threshold certification requirement and thereby submitted *prima facie* evidence of his or her eligibility for a U visa. If the applicant meets this burden, he or she is placed in deferred action status. This status must be renewed annually and provides a legal mechanism for the applicant to obtain an annual work permit. A victim in deferred action status can renew indefinitely.

¹⁰ INA §101(a)(15)(U)(II).

¹¹ ...To qualify under the U category the alien must file a petition with the Attorney General and establish therein:
(1) The alien has suffered substantial physical or mental abuse as a result of having been a victim of any one of an extensive list of 26 criminal activities, including rape, torture, domestic abuse, enslavement prostitution, etc.;
(2) As certified by a law enforcement or immigration official, the alien (or if the alien is a child under age 16 the child’s parent, guardian or friend) possesses information about the criminal activity involved;
(3) The alien has been, is being or is likely to be helpful in the investigation and prosecution of the criminal activity by Federal, state or local law enforcement authorities; and,
(4) The criminal activity violated the laws of the United States or occurred in the United States.

66 FR 32740 (2001) (to be codified at 22 CFR Parts 41 and 42).

¹² October 8, 2003 U.S.CIS Memorandum for Director, Vermont Service Center Re: Centralization of interim Relief for U Nonimmigrant Status Applicants p. 1.

¹³ October 8, 2003 U.S.CIS Memorandum for Director, Vermont Service Center Re: Centralization of interim Relief for U Nonimmigrant Status Applicants p. 1.

Ms. R. has filed the required paperwork as evidenced by her receipt of an I-797 Notice of Action from the USCIS.¹⁴ Ms. R.'s I-797 provides:

A review of your request for interim relief has determined that you may be eligible for U nonimmigration status under section 101(a)(15)(U) of the Immigration and Nationality Action. Therefore, CIS has decided to place your case in deferred action. This is an administrative choice to give some cases lower priority for removal while implementing regulations are being promulgated. CIS does not anticipate instituting action for removal at this time. Deferred action will remain in effect for a period of one year unless it is terminated earlier for reasonable cause and upon appropriate notice. You may request an extension of deferred action. Such a request may be submitted within 120 days of the expiration date of the deferred action validity period.

A COPY OF THIS NOTICE MUST ACCOMPANY ANY REQUEST FOR AN EXTENSION OF THIS DETERMINATION.

PLEASE NOTE: DEFERRED ACTION DOES NOT CONFER ANY IMMIGRATION STATUS, AND THE DECISION TO ASSESS DEFERRED ACTION DOES NOT MEAN THAT A SUBSEQUENT APPLICATION FOR U NONIMMIGRANT STATUS WILL BE APPROVED.

DEFERRED ACTION VALIDITY PERIOD: March 17, 2006 to March 16, 2007.¹⁵

Ms. R.'s I-797 Notice of Action goes on to instruct her how to apply each year to extend her U-nonimmigration deferred action status.

Ms. Bronen explained that while the I-797 uses conditional words such as "may be eligible" and requires Ms. R. file annually for an extension, that as a practical matter it is not a temporary action. This is because to receive the deferred action status, the USCIS must decide if Ms. R. has made a *prima facie* showing of eligibility for a U visa. Ms. Bronen believes that once regulations are promulgated, individuals such as Ms. R. will be permitted to apply for permanent residency because they will have essentially been in U visa status for over three years. However, until the Department of Homeland Security promulgates regulations Ms. R. is stuck, indefinitely, in deferred action status and cannot obtain permanent residency status.

Ms. R. testified that it is her intent to apply for permanent residency as soon as she can. She and her children intend to stay in Alaska.

¹⁴ Exhibit 5 p. 3.

¹⁵ Exhibit 5 p. 3. (emphasis in original)

II. Discussion

Ms. R. is a legal alien. To qualify for a PFD she must meet certain eligibility requirements including being a resident of the State.¹⁶ Residency for purposes of PFD eligibility requires a physical presence in Alaska and an intent to remain indefinitely. In *Andrade, supra*, the Alaska Supreme Court stated that the statutory requirement that ““an alien lawfully admitted for permanent residence in the United States’ should be construed as incorporating two requirements inherent in Alaska residency: legal presence and an intent to remain indefinitely.”¹⁷ The court distinguishes nonimmigrant aliens whose presence is expressly conditioned on an intent not to seek domicile in the United States from those whose can intend to seek residency.¹⁸ Therefore, when analyzing whether a legal alien lawfully admitted for permanent residence under federal law is a resident for purposes of PFD eligibility, the central question is whether the alien’s legal status precludes him or her from forming the intent to remain in Alaska indefinitely.¹⁹ In response to the court’s findings in *Andrade*, the division promulgated 15 AAC 23.154(d) to provide guidance when determining whether an alien is a resident for purposes of PFD eligibility. Ms. R. believes that because she has qualified for deferred action status the division erred when it did not considered her to be lawfully admitted for permanent residence under 15 AAC 23.154(a)(1) or (a)(2). Alternatively, she also believes that the division erred when it would not recognize that submitting the required paperwork for an early U visa application is a “significant step” as contemplated by 15 AAC 23.154(d). Ms. R. has the burden of proving that she is eligible for a PFD.²⁰

Ms. R. and others like her are in a bureaucratic abyss. Congress has passed a law to protect victims of certain crimes. It tasked the USCIS with promulgating regulations to provide a procedure for these victims to become permanent U.S. citizens. However, the USCIS has failed to timely promulgate regulations and instead it has directed that these victims may not be removed from the United States until they have had the opportunity to avail themselves of the

¹⁶ See AS 43.23.005 (state residency is required for PFD eligibility); AS 01.10.155 (defining state residency as physical presence with intent to remain indefinitely); 15 AAC 23.143 (identifying the ways in which an individual may demonstrate the requisite intent to remain or not remain indefinitely in Alaska).

¹⁷ *Andrade*, 23 P.3d at 70.

¹⁸ *Andrade*, 23 P.3d at 72-74.

¹⁹ The *Andrade* court concluded that: “if they are able to form such an intent under federal law, then some are able to form the intent to remain in Alaska.” *Andrade*, P.3d at 72.

²⁰ 15 AAC 23.154(e) and 15 AAC 23.05.030(h).

provisions of the Act, which is permanent residency,²¹ thereby placing these victims in indefinite non-immigration deferred action status. These victims may stay in deferred action indefinitely as long as they file the required annual paperwork.

Ms. R.'s "nonimmigrant" classification does not fit neatly within the examples of eligible aliens set forth at of 15 AAC 23.154. 15 AAC 23.154(a) provides:

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. 1101-1190 (Immigration and Nationality Act) that allows the alien to adopt the United States as the alien's domicile, *including* the following statuses:...(emphasis added)

The word "including" means including but not limited to.²² Therefore the examples identified at 15 AAC 23.154(a) are not all inclusive. To qualify as an eligible alien under 15 AAC 23.154(a) it is only necessary that the alien be in a status that allow her to adopt the United States as her domicile.

Ms. R. has what is, for all practical purposes, an indefinite deferred action status. Filing the paperwork with the USCIS to obtain her annual extension constitutes a substantial step to continue her indefinite status. Therefore, as long as Ms. R. can demonstrate she has filed for her annual extension of her deferred action status, she has done the most she can do to formally evidence her intent remain in the United States.

Ms. R. testified that she intends to stay in Alaska and will apply for permanent residency as soon as the regulations are promulgated. She is a credible witness. There is no reason to doubt her intentions. Ms. R. has proven that it is more likely than not that as an early U visa applicant placed in deferred status by the USCIS she is allowed to adopt the United States as her domicile and she has done so. Therefore, under 15 AAC 23.154(a) she is an eligible alien.

The division denied the minor children's applications for 2006 PFDs because they did not have an eligible sponsor. Ms. R., as an eligible applicant for a 2006 PFD, is a suitable sponsor of her minor children. Accordingly, the children's applications should be granted.

²¹ October 8, 2003 U.S.CIS Memorandum for Director, Vermont Service Center Re: Centralization of interim Relief for U Nonimmigrant Status Applicants p. 1.

²² AS 01.10.040(b)

III. Conclusion

Ms. R. is an Alaska resident for purposes of PFD eligibility. She has established by a preponderance of the evidence that she has the requisite legal presence and intent to remain indefinitely. Therefore, her appeal is granted and the decision of the division is reversed. Similarly, her minor children's appeals are granted and the decision of the division denying their applications for 2006 PFDs is reversed.

IV. Order

E. R.'s appeal of the division's denial of her 2006 PFD application is granted. The decision of the division is reversed.

A. B. O., B. N. O. and C. G.'s appeals of the division's denial of their 2006 PFD applications are granted and the division's decisions are reversed.

DATED this 10th day of July, 2007.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 43.05.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Revenue and in accordance with AS 44.64.060, adopts this Decision and Order 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 Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 7th day of August 2007.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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