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

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| In the Matter of | ) | |
| | ) | |
| O. Y. | ) | OAH No. 07-0723-PFD |
| | ) | Agency No. 07455333-9 |
| 2007 Permanent Fund Dividend | ) | |

## I. Introduction

Dr. O. Y., a geneticist who has been working at the University of Alaska since 2005, timely applied for a 2007 Permanent Fund Dividend (PFD). The Permanent Fund Dividend Division denied her application for the single reason that she was not a citizen, an alien lawfully admitted for permanent residence, or a federally recognized refugee or asylee before January 1 of the qualifying year, and it held to that position through an informal appeal.

Dr. Y. filed a formal appeal. At a hearing on February 4, 2008, she represented herself, testifying in person and submitting to cross-examination by the division.

This appeal turns on technical provisions of the PFD laws relating to aliens as those provisions have been interpreted by the Alaska Supreme Court and prior decisions of the Department of Revenue. Neither party was aware of those prior decisions at the hearing, and both Dr. Y. and the division appeared to conclude that her application could not be sustained. In light of the earlier interpretations, however, Dr. Y.'s circumstances do meet the threshold for a 2007 PFD.

## II. Facts

Dr. O. Y. is a citizen of Turkey who came to the United States in 1993.[1] For several years leading up to 2005 she worked as a postdoctoral research scholar in gene expression and gene regulation at the University of Iowa.[2] In May of that year she moved to Anchorage to assume a full-time fellowship at the University of Alaska, where she does research in the area of chromatin biology.[3]

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1 Exhibit 8, p. 10 (Form I-140).

2 Exhibit 8, p. 19 (Form I-140).

3 *Id.*, pp. 18-19; Exhibit 5, p. 1 (Employment Verification).

Since her arrival in the country fifteen years ago, Dr. Y. has lived in the United States under a Class H-1B visa.[4] In early 2005, before she moved to Alaska, she decided to seek permanent resident status. She contracted with the Antuñez de Mayolo Law Office in Iowa to pursue the application, paying a $4000 retainer of which she remitted $2000 immediately and $2000 over the succeeding ten months.[5] It is time-consuming to develop a successful application of this type, and there is no particular reason to hurry the process so long as the current visa can readily be extended. During 2006, she collected appropriate support letters. Once the application was ready, it was apparently impossible to file applications for a time because the fiscal year's quota of application numbers was exhausted. On October 1, 2007, the first day of a new federal fiscal year, her attorney filed a form I-140 with the United States Citizenship and Immigration Services (USCIS), seeking permanent residency under a National Interest Waiver for professionals holding advanced degrees or aliens of exceptional ability.[6] The application is still pending at this time.

Dr. Y.'s PFD has been denied solely on the basis of her immigration status. Apart from legal status, there are no issues regarding her ties to Alaska or lack of ties to any other state or country.

## III. Discussion

To be eligible for a PFD, an individual must meet each of seven criteria set out in Alaska Statute 43.23.005(a). Two of these criteria are of interest in this appeal: the third, which requires that a person be "a state resident during the entire qualifying year," and the fifth, which requires that on the date of application the person be a citizen, refugee, or asylee (all not applicable to Dr. Y.) **or** "an alien lawfully admitted for permanent residence in the United States."

The easier of these two criteria to resolve in the present case is the second, whether Dr. Y. is "an alien lawfully admitted for permanent residence in the United States." One might suppose—based on the language alone—that in order to qualify Dr. Y. would, as of the date of her application, have to have had her application for permanent residency *granted*. In fact, however, it is well established that "lawfully admitted for permanent residence," as it appears in

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4 Exhibit 3, pp. 6-7 (visa documents); Exhibit 5, p. 2 (current extension).

5 Y. testimony.

6 *Id.*; Exhibit 8, p. 10.

this state law, has a meaning different from similar phrases in federal law. Confirming an earlier Department of Revenue interpretation, the Alaska Supreme Court has held that the phrase does not require that the alien actually be admitted permanently by the USCIS, but instead means only that the alien must "be legally present and able to form the requisite intent to remain in Alaska."[7] Holders of H-1B nonimmigrant work visas, such as Dr. Y., are of course "legally present." As for ability to form "the requisite intent," the Court has explained that one has this ability if one's visa is not in one of the categories where admission to the country is conditioned on an intent not to abandon one's foreign residence.[8] The Department of Revenue has uniformly acknowledged in the past that the holders of H-1B visas are subject to no such condition, and can legally form the intent to remain in Alaska.[9]

The other criterion at issue, state residency, is established "by being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state."[10] The Department of Revenue has adopted a regulation, 15 AAC 23.154(d), to guide the determination of whether an alien has sufficiently demonstrated the required intent. The regulation establishes that holders of limited-duration visas that permit holders to form the intent to remain will not be considered residents

> under AS 43.23.005(a)(3) . . . 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.[11]

The division has taken the position in this case that because Dr. Y. had not filed her I-140 application with the USCIS before January 1, 2006, the beginning of the qualifying year for the 2007 dividend, she is prevented from making the necessary showing "as a matter of law." The division has engaged in no further questioning or analysis regarding Dr. Y.'s actions, because it would read this regulation to define one step—the "filing of a petition or application"—as the only kind of step that would be "significant."

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7 *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 75 (Alaska 2001).

8 *See id.* at 72-73. This holding has since been codified in regulations: 15 AAC 23.154(a)(1) and 15 AAC 23.154(b).

9 *See In re P.M.*, Caseload No. 020414 (Dep't of Revenue 2002), at 1-2 & n.1 (noting that in contrast to some other visa types, immigration law permits an H-1B visa holder to "intend to immigrate permanently to the U.S."); *In re H. & M.N.*, Caseload No. 020386 (Dep't of Revenue 2002); *In re M.K.*, Caseload No. 020442 (Dep't of Revenue 2002), at 1.

10 AS 01.10.055.

11 15 AAC 23.154(d).

The reading of 15 AAC 23.154(d) that the division advocates today was considered and rejected by the Department of Revenue shortly after the regulation was passed. In *In re P.M.*,[12] the Department held:

> The last sentence of the regulation is a particular point of contention in this case. The Division takes the position that, under the last sentence, no step is significant unless it includes the filing of a petition or application with the INS. The applicants argue that while the filing of a petition or application will always be a significant step, the regulation does not preclude other acts from being considered significant steps as well.
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> Any ambiguity about the use of "includes" in the regulation is resolved by a statutory rule of construction that states, "when the words 'includes' or 'including' are used in a law, [they shall] be construed as though followed by the phrase 'but not limited to.'" [AS 01.10.040] Thus, under the regulation a "significant step" includes, *but is not limited to,* filing a petition or application with the INS. The regulation contemplates that a person could take some other action as well that could be considered a significant step toward converting or adjusting to a permanent or indefinite status.
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> . . . [A] significant step is any formal action or procedural step that unequivocally demonstrates intent to obtain immigrant or resident status.[13]

A compelling reason would be needed to abandon this longstanding and quite conventional reading of the regulation at this time, and the division has offered no reason at all. Accordingly, 15 AAC 23.154(d) will be applied in this case as it has been in the past: to permit an applicant to satisfy the "significant step" requirement in a variety of ways, not limited to the example listed in the regulation.

In this case, Dr. Y. signed a contract with an attorney for the sole purpose of obtaining permanent residency status, paying $4000 in advance for this service. A $4000 payment and contractual commitment appears to be a "significant" step toward converting or adjusting to a permanent or indefinite status. The division, relying entirely on its reading of 15 AAC 23.154(d), has done nothing by way of cross-examination or argument to undermine this conclusion. For this reason, and because the division has not challenged Dr. Y.'s other indicia of Alaska residency in any way, her application for a PFD should be granted.

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12 *Supra* note 9.

13 *Id.* at 2-3 (italics in original) (AS 01.10.040 slightly misquoted in original, corrected here).

**Conclusion**

Because the sole basis for denying Dr. Y.'s application rested on an erroneous reading of the law and was mistaken, she is entitled to a 2007 Permanent Fund Dividend.

## IV. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the application of O. Y. for a 2007 Permanent Fund Dividend is REVERSED.

IT IS FURTHER ORDERED that the application of O. Y. for a 2007 Permanent Fund Dividend be GRANTED.

DATED this 5th day of February, 2008.

By: *Signed*
Christopher Kennedy
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 3rd day of March,2008.

By: *Signed*
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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