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

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| IN THE MATTER OF | ) | |
| | ) | |
| J. E. R., S. C. | ) | OAH No. 09-0243-PFD |
| R. and K. E. R. | ) | Agency Nos. 2008-044-1989, |
| (minor child) | ) | 2008-044-1990, 2008-044-1991 |
| | ) | |
| 2008 Permanent Fund Dividends | ) | |

# DECISION

## I. Introduction

J. and S. R., husband and wife, timely applied for 2008 Permanent Fund Dividends (PFDs) for themselves and their daughter K.[1] The Permanent Fund Division denied their 2008 applications for the single reason that they had not taken a "significant step" to convert or adjust their immigration status to resident or permanent. A formal hearing was held June 9, 2009 and June 25, 2009. Ms. R. represented the family and participated in person at the June 9, 2009 hearing and by telephone on June 25, 2009. PFD Specialist Peter Scott represented the division and participated by telephone.

This appeal turns on the technical provisions of the PFD laws relating to aliens claiming residency for purposes of the PFD as those provisions have been interpreted by the Alaska Supreme Court and prior decisions of the Department of Revenue. Applying these decisions to the facts of this case results in a finding that the R.s did not take a "significant step" as contemplated by Department regulation until December 2007 when Ms. R. contracted with an attorney to file a Labor Certification Application and commence the immigration process. Therefore, the decision of the division denying the R.s' applications for 2008 PFDs should be affirmed.

## II. Facts

This appeal addresses the question of when an alien PFD applicant living in Alaska has taken a substantial step demonstrating their intent "to remain in the state indefinitely and to make a home in the state."[2] The facts in this case are not in dispute. Rather it is the legal significance of these facts that are in dispute. The R.s believe that their residency began on August 10, 2006, when the family moved to No Name City, Alaska where Ms. R. accepted employment as a teacher.[3] The

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1 Ms. R. is K.'s sponsor.
2 AS 01.10.055, AS 43.23.005(a)(5), 15 AAC 23.154(d).
3 *See e.g.*, Exhibit 1 at 3.

division contends that the R.s did not take a "substantial step" until August 29, 2008, when the United States Citizen and Immigration Service (USCIS) received Ms. R.'s USCIS Form I-140 Immigrant Petition for Alien Worker (Form I-140).

The R.s came to the United States from the Philippines in 2003. Ms. R. has a Masters in English Education and was teaching in Texas under an H-1B visa.[4] An H-1B visa is a visa classification under which a foreign national may temporarily remain in the U.S. and work. H-1B visas are generally valid for three years and can be extended for an additional three-year period.[5] This type of visa is employer-specific and obtained by the employer after the employer has filed a Labor Condition Application with the U.S. Department of Labor's Employment and Training Administration (ETA) attesting that there is a shortage of available workers with the skills required by the employer. While an H-1B visa is a temporary visa, the holder of an H-1B may form the intent to become a permanent resident and may file to adjust to permanent resident status. Thus, the H-1B is referred to as a "dual-intent" visa and is seen for some as the first step to permanent resident status. Many other people who receive H-1B visas plan to work in the United States for a few years and then return to their home countries. Thus, absent objective indicia of intent it is not possible to determine whether the holder of an H-1B is planning to a permanent resident of the U.S. or merely a temporary worker.

Ms. R.'s family joined her under H-4 visas.[6] An H-4 visa allows the dependent spouse and children of the H-1B visa holder to enter the U.S. The nonimmigrant status of an H-4 visa holder is tied to the status of the H-1B visa holder.[7] For this reason, this decision focuses on the legal significance of Ms. R.'s actions for purposes of PFD eligibility.[8]

In April 2006, while seven months pregnant, Ms. R. traveled at her own expense to a job fair in Alaska. It was there that she and the Lower Yukon School District (LYSD) entered into a one year employment contract for the 2006/2007 school year for Ms. R. to teach in the M. V. schools.[9] Prior to the job fair, in January 2006, she started the process to become a certified teacher in Alaska

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4 Exhibit 10 at 14.

5 *See* 8 C.F.R. § 214.2(h)(15)(ii)(B)(1); *see also* 8 U.S.C. § 1184(g)(4) (limiting the term of authorized admission to six years).

6 Exhibit 3 at 2, 3.

7 *Id.;* Exhibit 10 at 77.

8 The filing date (priority date) of the ETA Form 750 on behalf of the H-1B visa holder is applied to the H-4 visa holder. *In re P.M.,* Caseload No. 020414 (Dep't of Revenue 2002) at 3.

9 Exhibit 4 at 1 (Professional Services Contract dated April 12, 2006).

by taking the PRAXIS I test.[10] To obtain certification, in addition to meeting Alaska's PRAXIS requirements, Ms. R. was required take classes specific to Alaska. She obtained her temporary certification on April 24, 2006 and her permanent certification on October 5, 2007.[11]

Although the visa is employer-specific, it is not uncommon for the beneficiary (employee) to pay any cost associated with the visa process. After meeting with the LYSD in April 2006, Ms. R. paid an attorney in Texas $2,590 to transfer her visa to the LYSD in Alaska and petition for an extension of her H-1B visa status. She also paid $500 to transfer her families' H-4 visas. The extension was granted and Ms. R.'s visa and those of her family were extended to August 1, 2009.[12]

The R.s wanted to convert their status from nonimmigrant temporary to immigrant permanent. As the holder of an H-1B visa Ms. R. was eligible to apply for immigrant status either through employer sponsorship or self-petition.[13] She elected the former. However, before she felt she could ask her employer to sponsor her she needed to obtain the credentials to be classified as a highly qualified teacher.[14]

In February 2007 Ms. R. approached her employer about sponsoring her for permanent status.[15] Her employer agreed to sponsor her and in November 2007 she contacted her attorney retaining him to pursue immigrant status.[16] The fee, including advertising costs for the labor certification application, was $3,873.21.[17] Once the labor certification application was approved, an immigrant petition (USCIS Form I-140) was to be filed.[18] An additional fee of $1,575 was charged for the I-140 Petition.[19] In March 2008, the Labor Certification Application was filed and on August 29, 2008 the Form I-140 was filed.[20] Ms. R. has since been granted immigrant status and continues to teach in the M. V. schools.[21]

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[10] The Praxis test series are standardized tests that states use as part of their teacher licensure and certification process. The *Praxis I* test measures basic academic skills and the *Praxis II* test measures general and subject-specific knowledge and teaching skills. Passing scores are set by an individual state. *See* http://www.ets.org.

[11] Exhibit 10 at 31, 32.

[12] Exhibit 3 at 2 – 4.

[13] Exhibit 7 at 3.

[14] R. Testimony.

[15] R. Testimony; Exhibit 24 at 1.

[16] Exhibit 10 at 39 – 45; Exhibit 10 at 26, 27 (Attorney Fee Statements showing that as of December 4, 2007, Ms. R. owed M. B. G. & Associates $2,500 for "Labor Cert (PERM)").

[17] *Id.*; $2,500 for Labor Certification + $1,337.21 estimated advertising expense = $3,837.21.

[18] Exhibit 10 at 47.

[19] Exhibit 10 at 47; Exhibit 10 at 28 (Attorney Fee Statements showing that as of July 20, 2008, Ms. R. owed M. B. G. & Associates $1,575 for "I-140").

[20] Exhibit 3 at 5; Exhibit 10 at 22; Exhibit 27 at 1.

[21] Exhibit 14; R. Testimony.

The R.s filed their applications for the 2008 PFD in January 2008. In October 2008, the division informed them that their applications had been denied because they were not "in immigration status with the USCIS before January 1, 2007" and therefore were not residents for purposes of the PFD program throughout the 2008 PFD qualifying year.[22] They appealed, arguing that as an H-1B visa holder, Ms. R. could legally form the intent to become a permanent resident and because her employer was petitioning for immigration status, Ms. R. could extend her visa indefinitely. Therefore, the R.s concluded that Ms. R. could legally form the intent to remain in Alaska indefinitely and was a resident for purposes of the PFD program. Mr. R. and K. advanced similar arguments. In the alternative, the R.s argue that Ms. R. took a significant step in 2006 to obtain permanent status when she obtained the necessary certifications so her employer would sponsor her for immigration status.

The division rejected the R.s' arguments and this formal appeal followed. Prior to the hearing, the division filed its Position Statement. The division argued that denial was appropriate because the family did not take a significant step to convert or adjust to permanent or indefinite status prior to the start of the 2008 PFD qualifying year (January 1, 2007) as required by 15 AAC 23.154(d). The division also asserted that it sought to "re-establish precedent" because the four prior decisions addressing the factual issue presented in this appeal "mischaracterized" the immigration process.[23]

## III. Discussion

Apart from legal status, there are no issues regarding the R.s' ties to Alaska or lack of ties to any other state or country. Specifically, the division denied their applications for 2008 PFDs because it concluded that they were not citizens or aliens lawfully admitted for permanent residence in the United States, or aliens with refugee status, or aliens with asylee status prior to January 1, 2007, the qualifying year for the 2008 PFD.[24] The division reached this conclusion because it determined the R.s had not taken a "substantial step to convert or adjust to a permanent or indefinite status" as required by 15 AAC 23.154(d) until August 2008, when Ms. R. filed the USCIS Form I-140.

The outcome of the R.'s appeal rests on the answer to one question: has the family provided evidence sufficient to establish that each member has taken a "significant step to convert or adjust

[22] Exhibit 5.
[23] Division's Position Statement at 3.

to a permanent or indefinite status. A significant step includes the filing of a petition or application with the USCIS."[25] A significant step "is something that directly evidences the applicant's intent to obtain permanent U.S. residency. It is any action or procedural step that unequivocally demonstrates intent to obtain immigrant or resident status."[26]

As discussed below, the R.s did not take a significant step to adjust their immigration status to permanent until December 2007 when Ms. R. contracted with an attorney to pay over $3,500 for the attorney to prepare and file the labor certification application. The division is correct that Ms. R. is not eligible for a 2008 PFD, however, the division's position paper raises several arguments that reveal a misunderstanding of the immigration process and prior Department decisions addressing this issue. Therefore, it is necessary to first discuss the immigration process as applied to the R.s and the prior Department decisions concerning when an H-1B visa holder has taken a "significant step" before addressing the specific facts of this case.

A. *The Legal Standards and Immigration Process*

1. Residency for Purposes of PFD Eligibility

To be eligible for a PFD, an individual must meet each of seven criteria throughout the qualifying year.[27] The qualifying year for the 2008 PFD is 2007.[28] The criteria are 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 the R.s) or "an alien lawfully admitted for permanent residence in the United States."[29] The easier of these two criteria to resolve in the present case is the second, whether the R.s are aliens "lawfully admitted for permanent residence in the United States." To meet this criterion is not necessary that an applicant would have to have had their application for permanent residency *granted.* It is well established that "lawfully admitted for permanent residence," as it appears in this state law, means only that the alien must "be legally present and able to form the requisite intent to remain in Alaska."[30]

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[24] *See generally,* Division Formal Hearing Position Statement.
[25] 15 AAC 23.154(d).
[26] *In re M.K. and I.R.*, Caseload No. 020442 (Dep't of Revenue 2002) at 3; *In re H. & M.N*, Caseload No. 020386 (Dep't of Revenue 2002).
[27] AS 43.23.005(a).
[28] 15 AAC 23.993(11).
[29] AS 43.23.005(5).
[30] *State, Dep't of Revenue v. Andrade,* 23 P.3d 58, 75 (Alaska 2001).

Holders of H-1B nonimmigrant work visas, such as Ms. R. and their accompanying family members under H-4 visas, are of course "legally present." As for ability to form "the requisite intent," the Alaska Supreme Court has explained that an applicant has this ability if the applicant'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.[31] The Department of Revenue has uniformly acknowledged in the past that the holders of H-1B visas and H-4 visas are subject to no such condition, and can legally form the intent to remain in Alaska.[32]

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."[33] 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. This 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.[34]

This begs the question: What is a "significant step?" The Department of Revenue has considered this question and answered:

> 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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31 *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).

32 H-4 visa holders have the ability to form "dual intent." *See In re P.M.,* Caseload No. 020414 (Dep't of Revenue 2002), at 1-2 & n.1 (noting that in contrast to other visa types, immigration law permits an H-1B visa holder and the accompanying family members on an H-4 visa 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. *In re O.Y.,* OAH No. 07-0723-PFD (March 2008).

33 AS 01.10.055.

34 15 AAC 23.154(d).

> . . . [A] significant step is any formal action or procedural step that unequivocally demonstrates intent to obtain immigrant or resident status.[35]

Therefore a significant step is an objective act that unequivocally demonstrates an intent to be a permanent resident. This is a fact-specific inquiry and it is not limited to the filing of a petition or application. The purpose of the regulation is simply to determine whether the applicant is more likely one of the H-1B holders who plans to return to their country of origin after working in the United States for a while, or whether the applicant is more likely one of the H-1B holders who plans to remain in the United States.

2. The H-1B Immigration Process

The immigration process is a multi-step process comprised of countless forms, petitions, and procedures, many of which change substantially from one year to the next. The forms that are of significance in the R.s' immigration process are the ETA Form 9035 (Labor Condition Application), USCIS Form I-129 (Petition for Nonimmigrant Worker), ETA Form 9089 f/k/a ETA Form 750 (Labor Certification Application),[36] and USCIS Form I-140 (Immigrant Petition for Alien Worker). All of these forms are filed by the employer and serve distinct purposes.

When there is a shortage of available workers in the U.S., employers may hire foreign workers. In some cases the employer must file a Labor Condition Application Form ETA 9035 with the U.S. Department of Labor (DOL) to certify that there is a shortage of available skilled workers in the occupation. The employer then files a Form I-129,[37] which is employer-specific and asks no identifying information about the potential employee.[38] The Form I-129, if approved, results in an H-IB visa for the beneficiary (employee).[39] Once an employee receives the H-1B visa, his or her dependents may obtain H-4 visas with the same restrictions as the H-1B visa holder except that the H-4 visa holder may not obtain employment in the U.S.[40]

When the employer petitions for immigrant status on behalf of the employee it does so by first filing a Labor Certification Application ETA Form 9089 with the DOL certifying that there is

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35 *In re P.M.* at 2-3 (italics in original) (AS 01.10.040 slightly misquoted in original, corrected here).

36 AS of March 28, 2005 the ETA Form 750 Labor Certification Application was replaced by the ETA From 9089. *See* http://www.uscis.gov/files/form/i-140instr.pdf at 4.

37 http://www.uscis.gov/files/article/E1eng.pdf.

38 Form ETA 9035 (Expiration date 1/31/2012) http://www.foreignlaborcert.doleta.gov/pdf/eta9035v50.pdf.

39 There are various types of visa classifications under which a foreign national may temporarily engage in employment related activities: H-1B (Specialty occupations in a field requiring highly specialized knowledge), H1-B1 (Specialty occupations for certain nationals of Singapore and Chile), H-2A (Temporary agricultural workers), etc. Because Ms. R. obtained an H-1B visa, the discussion will focus on the steps necessary for her to receive an H-1B visa.

40 Exhibit 7 at 11.

an employment position for the beneficiary of the application.[41] After the Labor Certification Application has been approved by the DOL, the employer files a Form I-140 on behalf of the employee.

The Labor *Condition* Application is associated with the Form I-129 and the Labor *Certification* Application is associated with the Form I-140. The division appears to have confused the Labor Condition Application with the Labor Certification Application.[42] The division is correct that the Labor Condition Application is a form that is required to be filed with the DOL by all employers seeking to use H-1B visa workers and is not employee specific. "The regulation requires more than merely obtaining a status [H-1B visa holder] that allows the applicant to become an Alaska resident if [she] chooses."[43] Therefore, filing the forms required to obtain an H-1B visa is not a significant first step for purposes of PFD eligibility because it does not unequivocally demonstrate an intent to obtain immigrant or resident status. Conversely, the Labor Certification Application is filed specifically for the purposes of certifying there is a position for the named beneficiary (employee) and is the first formal step in converting to permanent status. The Labor Certification Application does unequivocally demonstrate the H-1B visa holder's intent to obtain immigrant or resident status.[44] The Labor Certification Application, for most nonimmigrant workers, is an essential first step in converting to immigrant status.[45]

B. *Past Decisions*

Applying the legal standards and the immigration process set forth above, prior decisions have concluded that the filing of a Form I-140 (Immigrant Petition for Alien Worker), the filing of a Form ETA 9089 f/k/a/ Form ETA 750 (Labor Certification Application) with the U.S. Department of Labor on the H-1B visa holder's behalf, or an H-1B visa holder signing a contract with an attorney agreeing to pay a substantial amount for the sole purpose of obtaining permanent residency

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41 http://www.uscis.gov/files/form/i-140instr.pdf at 3.

42 In its Position Statement, the division correctly recognizes that the labor condition application must have been filed with the U.S. Department of Labor prior to the filing of a Form I-129. However the division then writes "Thus it is clear that the filing of an ETA 750, 'labor condition application', with the U.S. Department of Labor is an act that is undertaken automatically by every employer…who has sponsored an employee under an H-1B Visa." Division Position Statement at 4. H-1B visas are obtained by filing a Form I-129. The Labor Certification Application ETA Form 9089 f/k/a ETA Form 750 is associated with the Form I-140.

43 *In re M.K.*, Caseload No. 020442 (Dep't of Revenue 2002), at 3.

44 *In re P.M.*, Caseload No. 020414 (Dep't of Revenue 2002); *In re H.N. and M.N.*, Caseload No. 020386 (Dep't of Revenue 2002); *In re M.K. and I.R.*, Caseload No. 020442 (Dep't of Revenue 2002.).

45 *Id.*; Exhibit 27 at 1.

have all been found to be a "significant" step toward converting or adjusting to a permanent or indefinite status.[46]

In its Formal Position Hearing Statement, the division provides its assessment of these decisions and urges a departure from these prior decisions, yet it fails to offer a compelling reason to abandon the longstanding and conventional reading of 15 AAC 23.154(d).[47] It believes that a review of prior Department decisions is necessary because of what the division sees as a lack of conformity in prior decisions and because "the underlying significant steps referenced [filing an ETA Form 9089]…were mischaracterized by OAH as complying with 15 AAC 23.154(d)."[48] However, it is the division that has mischaracterized the multi-step immigration process by confusing the two forms filed by employers: the ETA Form 9035 Labor *Condition* Application filed by every employer seeking to hire H-1B visa holders and the ETA Form 9089 f/k/a ETA Form 750 Labor *Certification* Application filed by an employer petitioning for immigration status on behalf of an employee.

The division cites to three decisions addressing the filing of a petition or application with the INS as a significant step for purposes of 15 AAC 23.154(d). It believes these decisions are inconsistent and attribute a greater significance to the employer filing a Labor Condition Application than is actually supported by the facts. The division argues that the "filing of an ETA 750, 'labor condition application', with the U.S. Department of Labor is an act that is undertaken automatically by every employer in the United States who has sponsored an employee under an H-1B visa" and therefore is not a discretionary act. "[T]o characterize this action as a 'significant step' … misses the mark."[49]

In all three cited decisions the applicants were H-1B visa holders and in those cases where there were family members, the family members were present on H-4 visas. In two of the cases, the Form I-140 was required to be accompanied by a labor certification application and in one case, the applicant's skills were such that a labor certification application was not required.[50] The division

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[46] *In re P.M.,* Caseload No. 020414 (Dep't of Revenue 2002); *In re M.K. and I.R.,* Caseload No. 020442 (Dep't of Revenue 2002); *In re O.Y.,* OAH No. 07-0723-PFD (March 2008) (Applicant entered into contract with attorney and paid $4,000 for services).

[47] Division Formal Hearing Position Statement at 4.

[48] Division Formal Hearing Position Statement at 4, 6.

[49] *Id.* at 4, 5. The division's statement references the ETA Form 750.

[50] *In re P.M.,* Caseload No. 020414 (Dep't of Revenue 2002) (ETA Form 750 labor certification filed prior to Form I-140); *In re H.N. and M.N.,* Caseload No. 020386 (Dep't of Revenue 2002) (ETA Form 750 labor certification filed prior to Form I-140); *In re M.K. and I.R.,* Caseload No. 020442 at 3 (Dep't of Revenue 2002) (No ETA Form 750 labor certification mentioned prior to filing Form I-140).

believes these cases are "an example of the lack of conformity in OAH decisions on the question of H-1B visa applicants… [and] what constitutes a significant step…."[51] They are not. In the two cases where the applicant was required to file a labor certification prior to the Form I-140, the filing of the Labor Certification Application was the significant step.[52] In the one case where the applicant's skills were such that labor certification was not necessary, the applicant was found to have taken a significant step when he commenced the process of converting to permanent status by filling a Form I-140.[53] A careful reading of these cases reveals that it was not the receipt of the H-1B visa that was deemed to be a significant step but rather the first steps taken to officially change or convert to permanent status under immigration law, whether it be the filing of a labor certification application where required or if not required, the filing the Form I-140.

As explained above, the Form I-129 and its accompanying Labor Condition Application are employer-specific and are required to be filed, as noted by the division, by any employer seeking to hire nonimmigrant employees. Conversely, the Labor Certification Application accompanies the Form I-140. Both of these forms are employee-specific and filed to convert or change the employee's status from nonimmigrant to immigrant.

All H-1B visa holders are able to form the intent to remain in the U.S. However, the H-1B visa is for a limited period of time and is employer specific. Therefore, as a matter of law, an H-1B visa holder's intent to remain in the Alaska indefinitely is conditional. The division's regulation requires an applicant to demonstrate by objective manifestation his or her subjective intent. An applicant does this by taking some action beyond H-1B status that "unequivocally demonstrates an intent to obtain immigrant or resident status."[54]

The decisions cited by the division have uniformly held that filing the necessary form to start the immigration process or demonstrating a commitment to the immigration process by hiring an attorney and paying a significant retainer does constitute objective manifestation of his or her intent. The division expressed concerns that by accepting evidence of a contract with and payment of a fee to an attorney as sufficient to support a finding of a "significant step" for purposes of 15 AAC 23.154(d), the Department is opening Pandora's Box. The division hypothesizes the potential

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[51] Division Formal Hearing position Statement at 6.

[52] *In re P.M.*, Caseload No. 020414 (Dep't of Revenue 2002) (ETA Form 750 labor certification filed prior to Form I-140); *In re H.N. and M.N.*, Caseload No. 020386 (Dep't of Revenue 2002) (ETA Form 750 labor certification filed prior to Form I-140).

[53] *In re M.K. and I.R.*, Caseload No. 020442 at 3 (Dep't of Revenue 2002) (No ETA Form 750 labor certification mentioned prior to filing Form I-140).

[54] *In re H.N. and M.N.*, Caseload No. 020386 (Dep't of Revenue 2002) at 3.

for an applicant to enter into a contract with a minimum retainer of $250, thereby forcing the division to deal with the "formidable task" of following up during future application periods to determine if the applicant had indeed followed through with the process to obtain permanent resident status. The division's hypothetical is mere conjecture and is not supported by the decisions cited by the division or the facts of this case.

In *In re O.Y.*,[55] Dr. Y. had lived in the U.S. for 15 years under an H-1B visa. She moved to Alaska in 2005. Before moving to Alaska from Iowa she decided to seek permanent resident status and contracted with an attorney in Iowa to pursue the application and agreed to pay a $4,000 retainer. Dr. Y's Form I-140 was filed in October 2007. At the time of her formal hearing on appeal, February 2008, Dr. Y's petition for immigration status was still pending. The division argued that because Dr. Y had not filed the form I-140 prior to January 1, 2006, the qualifying year for the 2007 PFD, as a matter of law she could not show she had taken a significant step prior to the qualifying year. The decision recognized that a $4,000 payment and contractual commitment "appears to be a 'significant' step toward converting or adjusting to a permanent or indefinite status."[56] The division did not attempt to challenge this conclusion and Dr. Y's application for a 2007 PFD was granted.

Contrary to the division's characterization, *In re O.Y.* does not stand for the proposition that any nominal payment and contractual agreement equates to a significant step. Dr. Y contracted with an attorney in 2005. The amount of the 2005 PFD was $845.76. Yet in 2005, Dr. Y paid in excess of 400% of the PFD amount to her attorney. While not determinative, the amount of the PFD in comparison to the cost of the immigration process is indicative that contracting with the attorney was not a ruse to obtain a PFD. Whether a contractual agreement and payment of fees equates to a significant step is a factual determination to be decided on the facts of each case.

C. *Ms. R. took a significant step to become a permanent resident when in December 2007 she contracted with an attorney to commence the immigration process.*

As discussed above, the distinction drawn in prior decisions between merely holding an H-1B visa and taking a significant step remains valid. It is understandable how an application for the H-1B visa could be considered a significant step, and from Ms. R.'s perspective it may have been

[55] OAH No. 07-0723-PFD (March 2008).
[56] *Id.* at 4.

the most important step. However, for purposes of PFD eligibility, there must be an objective act that unequivocally demonstrates an intent to be a permanent resident.

Here, the evidence supports a finding that it is more likely than not that Ms. R. took a significant step toward permanent status when she hired an attorney for the process of obtaining immigration status in December 2007. The 2007 PFD was $1,654. She agreed to pay $3,837.21 to commence the immigration process, an amount in excess of 230% of the 2007 PFD. This amount did not include the fee for her dependents or the filing of the Form I-140. As early as February 2007 Ms. R. was discussing with her employer the school's willingness to petition for her immigration status.[57] Ms. R. started gathering the necessary support and documentation for her petition in 2007. When she contracted with an attorney in 2007, she objectively demonstrated her intent to start the process to convert or adjust to permanent or indefinite status and thereby took a substantial step to convert or adjust to permanent or indefinite status. However Ms. R. took this significant step after the start of the qualifying year for the 2008 PFD, so she and her family members are not eligible for the dividend in 2008.

## IV. Conclusion

The R.s did not take a significant step as contemplated by 15 AAC 23.154(d) until December 2007, when Ms. R. contracted with an attorney agreeing to pay a substantial amount to file a Labor Certification Application. Therefore, they are not eligible for the 2008 PFD. The Division's decision to deny the applications of J., S. and K. R. is affirmed.

DATED this 23rd day of October, 2009.

By: *Signed*
Rebecca L. Pauli
Administrative Law Judge

[57] Exhibit 24.

## 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 R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 24th day of November, 2009.

By: *Signed*
Signature
Ginger Blaisdell
Name
Director, Administrative Services Division
Title

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