

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

In the Matter of	)	
	)	
K. L. A.	)	
(Minor Child)	)	
	)	OAH No. 09-0381-PFD
<u>2008 Permanent Fund Dividend</u>	)	Agency No. 2008-062-8955

**DECISION**

**I. Introduction**

K. L. A., the minor child of B. and J. A. appeals the Permanent Fund Dividend Division’s denial of her application for a 2008 Permanent Fund Dividend (PFD). A hearing was held August 11, 2009. K. appeared through her father B. A. The division participated telephonically.

**II. Facts**

The facts of this matter are undisputed. The applicant, K. A., is three and half years old. She was born in California and is a United States (U.S.) citizen.<sup>1</sup> Her parents are not U.S. citizens and are here under the North American Free Trade Agreement (NAFTA). Her father holds a TN visa that is valid until 2012.<sup>2</sup> Her mother is a British citizen present on a TD visa which is a derivative of the TN visa.<sup>3</sup> Through her parents K. also has Canadian and British citizenship.

Under NAFTA a Canadian citizen may seek temporary entry to the U.S. for employment purposes.<sup>4</sup> The phrase “temporary entry” means “entry without the intent to establish permanent residence.... A temporary period has a reasonable, finite end that does not equate to permanent residence.”<sup>5</sup> Therefore, a person holding a TN visa cannot form the intent to establish permanent domicile in the U.S. To obtain entry under

---

<sup>1</sup> K. was born in the U.S.

<sup>2</sup> Exhibit 5.

<sup>3</sup> A TD visa is a derivative visa and is tied to the TN visa.

<sup>4</sup> 8 CFR §214.6(a).

<sup>5</sup> 8 CFR §214.6(b).

NAFTA, Mr. A. was required to demonstrate that his work would end at a predictable time and that he would depart upon completion of his work.<sup>6</sup>

K. moved with her parents to Alaska on September 18, 2006. Her parents own two houses in No Name City and Mr. A. testified that he planned to renew his visa status indefinitely but does not intend to seek immigration status. He also explained that if his TN visa status was not renewed and he was required to leave Alaska, K. would leave with her family. Mr. A. did not apply for a PFD because he knew he was not eligible.

However, Mr. A. believed K. was eligible for a 2008 PFD. Knowing that K. was required to have an eligible sponsor, Mr. A. gave attorney K. F. a limited power of attorney to apply for a PFD for K. as her sponsor. Mr. F. was eligible for and did receive a 2008 PFD. He timely applied for a 2008 PFD for K. K. is in the lawful physical custody of her parents, not Mr. F.

The division denied K.' application because 1) she did not have an eligible sponsor and 2) K. does not meet the definition of "state resident" for purposes of the PFD program. K. appealed, arguing that Mr. F. is an eligible sponsor and to deny K., a U.S. citizen, her PFD because of her parents' legal disability is a violation of her constitutional rights.

### **III. Discussion**

K. is a U.S. citizen. However, a citizen of the U.S. living in Alaska is not automatically eligible for a PFD. As a minor child, to qualify for a PFD, K. must have an eligible sponsor and she must meet all eligibility requirements.

A. *K. has an eligible substitute sponsor.*

Minor children do not file their own applications. A child's application is filed on their behalf by an eligible sponsor.<sup>7</sup> Generally, a minor's sponsor is the adult resident through whom the minor claims residency and who has lawful physical custody of the child.<sup>8</sup> However, Department regulations recognize that there may be times where the person with lawful physical custody of an otherwise eligible child may not be eligible for

---

<sup>6</sup> *Id.*

<sup>7</sup> 15 AAC 23.113.

<sup>8</sup> 15 AAC 23.113

a PFD and will permit a child to file through a sponsor that does not have lawful and physical custody of the child for the plurality of the qualifying year.<sup>9</sup>

Department regulations mandate that the division “*will accept* another eligible individual as a substitute sponsor *if the child meets all eligibility requirements* but does not have an eligible sponsor on file with the department” if the substitute is eligible.<sup>10</sup> Here, Mr. F. was eligible for a 2008 PFD. The division did not believe he was an appropriate substitute sponsor because it was concerned that K. would not receive the benefit of her PFD.

The division’s concern is valid but unfounded in this case. K.’s father gave Mr. F., a licensed attorney, a limited power of attorney to file a PFD application on behalf of K. Mr. F. was not charging Mr. A. for his sponsorship of K. As a licensed attorney, Mr. F. is subject to the Alaska Rules of Professional Conduct Rule 1.15, Safekeeping of Property, which would govern his conduct and control of K.’s PFD, if she was found eligible. Therefore, Mr. F. would be precluded from keeping K.’s PFD and if he did, K. and her parents would have recourse.

B. *K. does not meet all eligibility requirements for a 2008 PFD.*

To be eligible for a PFD the applicant must be an Alaska resident all through the qualifying year and at the date of application.<sup>11</sup> The qualifying year for the 2008 PFD is 2007.<sup>12</sup> A person establishes residency in Alaska by being physically present in the state with the intent to remain indefinitely and to make a home in the state.<sup>13</sup>

Children generally derive their intent to live in Alaska, and thus their residency, through their parents. This does not mean the child will always be a resident of the same place as his parent, but rather that the parent forms the child’s intent for him because the minor lacks the legal capacity to form intent.<sup>14</sup>

This begs the question whether K. as a minor child has the intent to remain indefinitely.

---

<sup>9</sup> 15 AAC 23.113(g).

<sup>10</sup> 15 AAC 23.113(i) (emphasis added); *See also In re B. & R. A.*, OAH No. 05-0589 (2006).

<sup>11</sup> AS 43.23.005(a)(2),(3). The qualifying year is the year immediately preceding January 1 of the dividend year. AS 43.23.095(6).

<sup>12</sup> AS 43.23.095(6).

<sup>13</sup> AS 01.10.055(a).

<sup>14</sup> *In re C., C. & B. W.*, Dep’t of Revenue Caseload No. 030690 at 3 (2004) (Recognizing that where parent did not intend to move to Alaska until 2002, but parent sent children to live in Alaska in 2001, the parent’s intent for the children was that they be present in Alaska with the intent to remain indefinitely.)

K.'s "intent" for purposes of residency is derived through her parents and what they intend for K., not Mr. F.<sup>15</sup> Mr. A. is not lawfully admitted for permanent residence, nor can he form the requisite intent to remain in Alaska indefinitely because, unlike some "dual intent" visas, a TN visa does not allow the holder to establish a permanent domicile in the U.S.<sup>16</sup> Mr. A. testified that if his TN visa were not renewed in 2012 and the family was required to leave the U.S., K. would leave with her family and not remain in Alaska. If he had convincingly testified that his intent was for K. to remain in Alaska even if he were forced to leave, perhaps to live with an American relative, her "intent to remain indefinitely" would not be at issue and K. could file though an authorized representative or upon reaching the age of majority.<sup>17</sup>

Mr. A. asserts that because he can renew his TN visa status indefinitely, K. can remain indefinitely. Mr. A. is mistaken. He cannot necessarily renew his TN visa status indefinitely; each time it is renewed, it is for a limited period of time. His status is dependent upon several factors beyond his control, including that he be employed by United States employers for an anticipated length of stay.<sup>18</sup> To extend his stay it is incumbent upon Mr. A.' employer to request the extension of stay by filing an United States Citizen and Immigration Service (USCIS) form I-129.

The situation presented in this matter is factually similar to that placed before the Alaska Supreme Court in *State v. Andrade*.<sup>19</sup> In *Andrade* the court addressed whether the language of AS 43.23.005(a)(5)(B), restricting alien PFD eligibility to applicants who are "lawfully admitted for permanent residence in the United States," was a violation of the Supremacy Clause and federal and state Equal Protection. The PFD year at issue was 1996 and the qualifying year was 1995. Martha Andrade had been and her husband was

---

<sup>15</sup> The limited power of attorney limited Mr. F.'s power to applying for a PFD. It did not give him any legal say in where K. would reside. Exhibit 1 at 5.

<sup>16</sup> *State v. Andrade*, 23 P.3d 58 (Alaska 2001) (concluding that if aliens not lawfully admitted for permanent residence under federal law may be able to form the intent to remain in Alaska for purposes of PFD eligibility if they are able to legally form the intent under federal law, that is they are not precluded by law from having "dual intent.")

<sup>17</sup> "An application for a dividend may be filed on behalf of a child only by the adult resident through whom the child claims residency, or by another authorized representative." 15 AAC 23.113(e). To receive a prior year dividend, the minor must have been eligible for a PFD if an eligible sponsor had applied for the child during the pertinent dividend year. 15 AAC 23.133(b)(3).

<sup>18</sup> 8 CFR §214.6(d)(3)(ii).

<sup>19</sup> 23 P.3d 58 (Alaska 2001).

an alien. Their children, like K., had been born in the U.S. One son was born in Alaska in 1994 and the other in California in 1991. Ms. Andrade became a lawful permanent resident of the U.S. on June 30, 1995. The family applied for 1996 PFDs. Ms. Andrade sponsored her sons. Their 1996 applications were denied because Ms. Andrade was not a resident alien with permanent status before the start of the qualifying year. The children's applications were denied because their sponsor, Ms. Andrade, was found ineligible.

The *Andrade* case is distinguishable in that it does not appear the children had a substitute sponsor as is the case here. Regardless, the decision is instructive in that the court did not separate the children's legal status as U.S. citizens from their parent's status as aliens. Rather, the court focused on whether the alien adult was able to legally form the intent to establish a domicile in the U.S., regardless of whether the person held a "nonimmigrant" visa. If the alien's immigration status precluded intent to remain in the country permanently or indefinitely, the alien could not legally form the intent to remain in Alaska indefinitely.

Mr. A. alien status only allows him to remain in Alaska for a finite period of time and does not permit him to convert to permanent resident status. Additionally, his ability to renew his alien status is contingent upon having an employer to sponsor him. For purposes of the PFD, Mr. A. is not an Alaska resident. Because Mr. A. forms K.'s intent for her and he has testified that it is not his intent to keep K. in Alaska should his visa not be renewed, K. is not an Alaska resident for purposes of the 2008 PFD. Her application for the 2008 PFD should be denied.

**IV. Conclusion**

K. L. A. is not eligible for the 2008 PFD. Accordingly, the decision of the division to deny her 2008 application is affirmed.

DATED this 10th day of November, 2009.

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

DATED this 16th day of December, 2009.

By: Signed V.S. Blaisdell \_\_\_\_\_  
Signature  
Ginger Blaisdell \_\_\_\_\_  
Name  
Director, Administrative Services Division \_\_\_\_\_  
Title

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