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

In the Matter of	)	
	)	OAH No. 10-0040-PFD
G. C.	)	Agency No. 2009-060-2664
	)	
2009 Permanent Fund Dividend	)	

DECISION AND ORDER

I. Introduction

G. C. timely filed an application for a 2009 permanent fund dividend (PFD). The Permanent Fund Dividend Division (division) denied the application initially and at the informal appeal level because the division concluded that Mr. C. was not eligible under AS 43.23.005(a)(5). Mr. C. requested a formal hearing by correspondence; however, upon review of the file it became apparent that a hearing would assist in the development of the record. The undersigned administrative law judge exercised her discretion and set the matter for a telephonic hearing on April 13, 2010. Mr. C. and the division participated. The record remained open to provide Mr. C. with the opportunity to submit additional information in support of his appeal. Because of Mr. C.'s schedule, it was agreed that he would have until June 17, 2010 to submit any additional evidence he would like considered and the division would have until June 24, 2010, to respond. The record closed without further submission from either party.

Mr. C. has met his burden of proving it was more likely than not that prior to January 1, 2008, he had taken a substantial step to convert to permanent residence in the United States. However, with the passage of time, that step may lose its significance and may fail to retain its "substantial" character.

II. Facts

Mr. C. is a Canadian citizen working for the North Slope Borough (NSB) in Barrow under an H-1B visa. An H-1B visa is a visa classification under which a foreign national may temporarily remain in the United States and work. H-1B visas are generally valid for three years and can be extended for an additional three-year period.[1] Mr. C.'s visa is valid from October 2007 – October

[1] *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).

2010.[2] He testified that because his most recent immigration efforts failed, he intends to extend the visa to 2013.

As an H-1B visa holder, Mr. C.'s options for immigration are limited. For reasons not relevant here, he cannot self-sponsor. He can obtain a visa if his employer sponsors him through what is now known as the Permanent Employment of Aliens (PERM) process. PERM requires that the employer certify Mr. C. would not be taking a job away from a U.S. citizen. The employer does this by complying with exacting recruitment requirements and specific rules regarding advertising the position.[3]

Mr. C. was hired by the NSB as a Government Accountant in early 2007.[4] In June 2007, Mr. C. contracted with an immigration attorney, paying an initial fee of $700 and agreeing to pay additional fees totaling $2,440 as the process proceeded.[5] As part of his employment contract the NSB agreed to sponsor Mr. C. for citizenship and commit $7,000 to be used for this purpose.[6] However, because Mr. C. had already accepted a position with the NSB, its Human Resources (HR) Department was unwilling to authorize advertising Mr. C.'s position because it would be for an already filled position.[7] When NSB's Assistant Controller position became available in May 2008, the NSB attempted to use this opportunity to comply with PERM.[8] In January 2009 it advertised in several news media and job sites.[9] Mr. C. was offered the position on April 16, 2009.[10]

In late June 2009, the NSB forwarded the hiring information, including the ads, to Mr. C.'s immigration attorney. It was then that the attorney noted that the advisement required a bachelor degree in accounting, which Mr. C. did not have. He did have the Canadian equivalency of a Certified Public Accountant license.[11] Unfortunately the advertisement did not note that other experience could substitute for the degree. Under these circumstances, the U.S. Citizenship and Immigration Services (USCIS) would not accept Mr. C.'s qualifications for the position.[12] At this

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2 Exh. 1 at 8.
3 20 C.F.R. Part 656.17(e).
4 Exh. 3 at 4; C. Testimony.
5 Exh. 9 at 2.
6 Exh. 3 at 3, 4.
7 Exh. 9 at 5.
8 Exh. 9 at 8 - 11.
9 Exh. 8.
10 Exh. 8 at 3.
11 Exh 9 at 14.
12 Exh. 9 at 14.

point the progress on Mr. C.'s change in immigration status stalled and the record reflects no more forward movement with the process since July 2009.

Because the HR Department will not advertise for a filled position, Mr. C. believes he will have to wait until another position becomes available.[13] Mr. C.'s supervisors are very supportive of his efforts to immigrate and to obtain a PFD. They have written letters in support of his appeal discussing Mr. C.'s intention to stay in Barrow and his contributions to the NSB. [14]

Mr. C. has explored whether he could immigrate through another process but has concluded he may not and that his best bet is through the PERM process with his employer sponsoring him. He believes he has fulfilled the "significant step" required by the PFD regulations because there is nothing further he can do.[15]

III. Discussion

Apart from legal status, the division has raised no other challenge to Mr. C.'s 2009 PFD eligibility. The division denied his application for a 2009 PFD because it concluded that he was not a citizen or alien lawfully admitted for permanent residence in the United States, or an alien with refugee status, or asylee status prior to January 1, 2008, the qualifying year for the 2009 PFD.[16] The division reached this conclusion because it determined that Mr. C. had not taken a "substantial step to convert or adjust to a permanent or indefinite status" as required by 15 AAC 23.154(d).

The outcome of Mr. C.'s appeal rests on the answer to one question: has he provided evidence sufficient to establish that he has taken a "significant step to convert or adjust to a permanent or indefinite status."[17] To answer this question it is necessary to first look at the legal standards and the immigration process.

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.[18] The qualifying year for the 2009 PFD is 2008.[19] 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

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13 C. Testimony.
14 Exh. 3 at 3, 4.
15 Exh. 6.
16 *See generally*, Division Formal Hearing Position Statement.
17 15 AAC 23.154(d).
18 AS 43.23.005(a).
19 15 AAC 23.993(11).

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 Mr. C.) or "an alien lawfully admitted for permanent residence in the United States."[20] The easier of these two criteria to resolve in the present case is the second, whether Mr. C. is an alien "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."[21]

Holders of H-1B nonimmigrant work visas, such as Mr. C., 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.[22] 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.[23] The H-1B is referred to as a "dual-intent" visa and is seen for some as the first step to permanent resident status; for others, it permits the holder to work in the United States for a few years and then return to their home countries. Therefore, absent objective indicia of intent it is not possible to determine whether the holder of an H-1B is planning to be a permanent resident of the U.S. or merely a temporary worker. However, the holder is able to form the requisite intent, and this ability is all the fifth criteria requires.

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."[24] 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

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20 AS 43.23.005(5).

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

22 *See id.* at 72-73. This holding has since been codified at 15 AAC 23.154

23 *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).

24 AS 01.10.055.

> 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.[25]

This leads to 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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> . . . [A] significant step is any formal action or procedural step that unequivocally demonstrates intent to obtain immigrant or resident status.[26]

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. When the employer petitions for immigrant status on behalf of the employee after it does so by first filing a Labor Certification Application with the U.S. Department of Labor.

The Labor Certification Application is filed specifically for the purposes of certifying there is a position for the named beneficiary (employee) and unequivocally demonstrating the H-1B visa holder's intent to obtain immigrant or resident status.[27] The Labor Certification Application, for

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[25] 15 AAC 23.154(d).

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

[27] *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.).

most nonimmigrant workers, is an essential first step in converting to immigrant status.[28] It is only after obtaining certification that the USCIS will proceed with the immigration process.

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 have all, on the specific facts of those cases, been found to be a "significant" step toward converting or adjusting to a permanent or indefinite status.[29]

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."[30] As noted above, prior decisions 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.

In re O.Y.,[31] 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. At the time of her formal hearing on appeal Dr. Y's petition for immigration status was still pending. 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."[32]

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28 *Id.*; Exhibit 27 at 1.

29 *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).

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

31 OAH No. 07-0723-PFD (March 2008).

32 *Id.* at 4.

In a more recent case, *In re J.E.R. et al.*,[33] the evidence also supported a finding that the applicants took a significant step toward permanent status when they hired an attorney to commence the immigration process. In that case Ms. R. agreed to pay $3,837.21 to commence the immigration process, an amount in excess of 230% of the PFD at issue. Additionally, Ms. R. established that she had, prior to contracting with an attorney, started gathering the necessary support and documentation in support of her petition. *In re O.Y.* and *In re J.E.R. et al.*, they do not stand for the proposition that any nominal payment and contractual agreement equates to a significant step. 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. *Mr. C. Took a Significant Step to Become a Permanent Resident When in June 2007 He Contracted with an Attorney to Commence the Immigration Process.*[34]

For purposes of PFD eligibility, there must be an objective act that unequivocally demonstrates an intent to be a permanent resident. On the facts of this case, the contractual agreement and payment of $700 fee (which is more than 50% of the 2009 PFD) was a significant step. This is corroborated by the employer's agreement to set aside $7,000 for purposes of the immigration process and its honest efforts through 2008 and January 2009 to comply with the exacting advertizing process. When viewed as a whole the facts establish, more likely than not, Mr. C. had taken a significant step toward converting to permanent status prior to January 1, 2008 and therefore he is eligible for a 2009 PFD.

The challenge presented by Mr. C.'s situation is that although his employer attempted to meet the advertising requirements which would precede the filing of the form I-140 (or its equivalent), it failed, and Mr. C. has presented no evidence that since 2009 his immigration process has progressed. However, each year's PFD eligibility requirements stand alone. With any state resident, intentions may change and situations over which a person has no control may take an unexpected turn. Mr. C.'s intent must be measured as of the qualifying year and the date he applied for the PFD.[35] In this respect, Mr. C.'s situation is no different from that of a resident who moved to

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33 OAH No. 09-0243-PFD (November 2009).

34 Immigration is a dynamic process. Thus, whether contracting with an attorney will remain a significant step in future years is a question that cannot be answered in this decision.

35 AS 43.23.005(a)(2).

Alaska in 2007 intending to stay and then in June 2009, something happens and the person moves out of state.

The immigration process is dynamic, not static. When it ceases to move forward, the objective evidence of subjective intent may lose its persuasive value. Mr. C. is present on an H-1B visa that is set to expire in October 2010. Even if it is renewed until 2013, by law he is precluded from staying in Alaska indefinitely. It is unknown whether Mr. C. has applied for the 2010 PFD. If he has, it may be that he has failed to continue the process to convert to permanent status or that with the passage of time, contracting with an attorney in June of 2007 is too stale to remain significant.

IV. Conclusion

G. C. did take a significant step as contemplated by 15 AAC 23.154(d) in June 2007, before the start of the qualifying year for the 2009 PFD. Therefore, he is eligible for the 2009 PFD. The Division's decision to deny Mr. C.'s 2009 PFD application is reversed.

DATED this 26th day of July, 2010.

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 23rd day of August, 2010.

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

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