

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

In the Matter of:)	
)	
N C)	
)	OAH No. 12-0085-PFD
<u>2011 Permanent Fund Dividend</u>)	Agency No. 2011-053-2020

DECISION

I. Introduction

N C applied for a 2011 Permanent Fund Dividend (PFD).¹ The Permanent Fund Dividend Division (division) denied his application based on its determination that Mr. C was not eligible for a 2011 PFD because he was not a U.S. citizen and had not been lawfully admitted for permanent residence in the United States during all of the 2010 qualifying year.² The division did not change its position during the informal appeal process,³ and Mr. C requested a formal hearing.⁴

A hearing was held on May 15, 2012. Mr. C appeared in person and testified on his own behalf. The division was represented by PFD Specialist Peter Scott, and called one witness, Timothy Brady, Special Agent, Homeland Security Investigations. Because Mr. C was not a state resident during all of 2010, the division's decision to deny Mr. C's 2011 PFD application should be upheld.

II. Facts

Mr. C was admitted into the United States on an H2B visa in 2007.⁵ Mr. C left Alabama, where he had been working, and came to Alaska in December of 2007.⁶ His visa expired on May 31, 2008.⁷ He applied for asylum in November of 2008.⁸ This application was originally denied in July of 2009, which caused removal proceedings to begin against Mr. C.⁹ A removal hearing was held, and the Immigration Judge granted the asylum application on September 21,

¹ Exhibit 1.
² Exhibit 4.
³ Exhibit 6.
⁴ Exhibit 10.
⁵ Exhibit 11, Brady testimony.
⁶ C testimony.
⁷ Exhibit 11, Brady testimony.
⁸ *Id.*
⁹ *Id.*

2010.¹⁰ Mr. C applied for permanent residency, and became a Permanent Resident of the United States in April of 2012.¹¹

III. Discussion

There are seven eligibility requirements to qualify for a PFD.¹² Any applicant who does not satisfy one or more of these requirements is not eligible to receive a PFD.¹³ The requirements at issue in this case are that an applicant be a resident during the entire qualifying year¹⁴ and also be

- (A) a citizen of the United States; [or]
- (B) an alien lawfully admitted for permanent residence in the United States; [or]
- (C) an alien with refugee status under federal law; or
- (D) an alien that has been granted asylum under federal law[.¹⁵]

Mr. C seeks eligibility as a resident who has been granted asylum. To be a state resident, Mr. C must be physically present in Alaska with the intent to remain indefinitely and to make a home.¹⁶

Several regulations have been adopted to assist in determining whether Mr. C was a resident throughout the qualifying year. The relevant regulation in this matter states

The department will consider an alien to be a state resident for purposes of AS 43.23.005(a)(3) on the date that the alien can demonstrate, to the satisfaction of the department, that the alien has formed the intent to remain indefinitely under the requirements of AS 43.23 and this chapter. The qualifying year for dividend eligibility for an alien who is a state resident begins on January 1 of the calendar year after the date the alien is lawfully admitted for permanent residence in the United States under this chapter, granted asylum under 8 U.S.C. 1158, or granted refugee status under 8 U.S.C. 1157 or 8 U.S.C. 1159.^[17]

Mr. C certified in his PFD application that he intends to remain in Alaska indefinitely,¹⁸ and he has been in Alaska since December of 2007. However, as an alien admitted conditionally to the United States, he could not form that legal intent until September of 2010.

¹⁰

Id.

¹¹

Id.

¹²

AS 43.23.005(a).

¹³

Some who do meet these requirements may still not be eligible. *See* AS 43.23.005(d).

¹⁴

AS 43.23.005(a)(3).

¹⁵

AS 43.23.005(a)(5). An alien is any person who is not a citizen or national of the United States. 15 AAC 23.154(g)(1); 8 U.S.C. §1101(a)(3) (Sept. 1, 2001 version).

¹⁶

AS 01.10.055 & AS 43.23.095(7).

¹⁷

15 AAC 23.154(c).

¹⁸

Exhibit 1, page 3.

Mr. C relies on the “significant step” regulation for establishing an earlier date as the start date of his Alaska residency.¹⁹ That regulation provides

If an alien may adopt the United States as the alien’s domicile, but has been assigned, under 8 U.S.C. 1101 – 1189 (Immigration and Nationality Act), a nonimmigrant status allowing only a limited stay in the United States, the department will not consider the alien to be a resident under AS 43.23.005(a)(3) and this section, 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.^[20]

The significant step regulation allows an alien to be considered a resident at a date prior to being granted permanent residence status. AS 43.23.005(a)(5)(B) was subject to a constitutional challenge in *State v. Andrade*.²¹ The *Andrade* court considered whether the phrase “lawfully admitted for permanent residence” unduly restricted eligibility for those aliens who could lawfully seek permanent residence in the United States, but had not yet been granted that status. The court noted that some aliens may not form the intent to remain because some aliens “are allowed in the country only if they do not intend to abandon a foreign residence.”²² Other aliens are allowed into the country without that restriction and are able to form the intent to remain in Alaska indefinitely.²³ During the pendency of the *Andrade* litigation, the Department of Revenue adopted an emergency regulation clarifying that aliens who were not on a restricted visa could form the intent to remain in Alaska and become Alaska residents.²⁴ The court held that Alaska law must recognize the possibility that some aliens who are not currently admitted for permanent residence may still form the intent to remain in Alaska indefinitely and thus become Alaska residents.²⁵

Department of Revenue regulations define residency in a way that distinguishes between those aliens who legally may form the intent to remain in Alaska indefinitely, and those who may not. An alien who is not restricted by his or her visa status from forming the intent to become a resident may do so and become an eligible resident for PFD purposes.²⁶ They can

¹⁹ Exhibit 5, page 4.

²⁰ 15 AAC 23.154(d).

²¹ 23 P.3d 58 (Alaska 2001).

²² *Andrade*, 23 P.3d at 69.

²³ *Id.*

²⁴ *Andrade*, 23 P.3d at 69 n. 41. A similar permanent regulation was subsequently adopted as 15 AAC 23.153.

²⁵ *Andrade*, 23 P.3d at 73.

²⁶ 15 AAC 23.154(a)(2).

objectively demonstrate that they have in fact formed that intent by taking a significant step towards being granted permanent or indefinite status.²⁷

Even with the significant step regulation, an alien can only form the intent to remain in Alaska indefinitely if he or she is lawfully present and legally allowed to form that intent.²⁸ When Mr. C was first admitted to the United States, it was pursuant to an H2B visa. This visa allows a non-citizen to work temporarily in the United States. A condition of this visa is that the alien have a “residence in a foreign country *which he has no intention of abandoning[.]*”²⁹ Thus, Mr. C was not among the class of aliens who may adopt the United States as his domicile while his visa was valid. After his visa expired, Mr. C was no longer lawfully present. Instead, as someone who has failed to maintain a valid visa, he was subject to being deported.³⁰ Mr. C’s presence only became legal after he was granted asylum and thereby granted relief from being removed from the United States.³¹

Mr. C could only legally form the intent to remain in Alaska indefinitely on or after September 21, 2010, when he was granted asylum. Accordingly, he was not a resident of Alaska prior to that date. He was not a resident during all of 2010, and therefore is not eligible for a 2011 PFD.³²

IV. Conclusion

Because Mr. C was not a resident for all of the qualifying year, the division correctly denied his PFD application.

Dated this 22nd day of May, 2012.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

²⁷ 15 AAC 23.154(d). This regulation does not say that all aliens who take a significant step towards permanent status will be Alaska residents. For example, some aliens may apply for permanent status but intend to move to a different state.

²⁸ *Andrade*, 23 P.3d at 74.

²⁹ 8 USC §1101(a)(15)(H)(ii)(b) (emphasis added).

³⁰ 8 USC §1227(a)(1)(C)(i).

³¹ *See* 8 USC § 1229a(c)(4) (Applications for relief from removal).

³² AS 43.23.005(a)(3).

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 18th day of June, 2012.

By: Signed
Signature
Jeffrey A. Friedman
Name
Administrative Law Judge
Title

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