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

In the Matter of	)	
	)	
F S and	)	
J, B, AND L S (minors)	)	OAH No. 14-1959-PFD
	)	Agency No. 2014-022-0640
2014 Permanent Fund Dividend	)	
	)	

DECISION AND ORDER

I. Introduction

F S is an individual residing in the United States under the Compact of Free Association between the Government of the United States and the Government of the Federated States of Micronesia (COFA). She applied for a 2014 Permanent Fund Dividend (PFD) for herself and her three American-born children. The Permanent Fund Dividend Division denied her application on the basis that, because of her immigration status, she legally could not meet one of the criteria for PFD eligibility—that of being, before January 1 of the qualifying year, a citizen, an alien lawfully admitted for permanent residence, or a federally recognized refugee or asylee. It held to that position through an informal appeal. The children were denied because, if she was not eligible, their applications would lack an eligible sponsor.

Ms. S filed a formal appeal. At a hearing on December 11, 2014, she represented herself, testifying in person and submitting to cross-examination by the Division.

To its credit, the Division gave the S case considerable thought, and recognized that there was some uncertainty about whether the applications should be denied. This decision concludes that Ms. S has an immigration status that does allow her to meet the criterion at issue. Accordingly, her dividend should be paid, and she is eligible to act as a sponsor for her children.

II. Facts[1]

F S came to the United States at the age of 12, and has remained primarily in this country for more than 20 years. At all times, she has remained a citizen of the Federated States of Micronesia.[2] Ms. S had two of her children in the United States.[3] She moved her family to

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1 The facts are taken from the testimony of Ms. S, unless otherwise noted.

2 *See* Ex. 3, p. 8.

3 Ex. 2, pp. 3, 4, 6.

Alaska in 2012.[4] She is not sure whether she hopes to return to Micronesia eventually, but the fair import of her testimony is that she has no current plans to do so.

Ms. S'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. The PFD Division has not questioned that Ms. S, if legally allowed to do so, has the subjective intent to remain indefinitely in Alaska.

Each of the children's applications was denied for the sole reason that their mother was not "an appropriate eligible sponsor."[5]

III. Discussion

A. Ms. S

To be eligible for a PFD, an individual must meet each of seven criteria set out in Alaska Statute 43.23.005(a). The criterion of interest in this appeal is the fifth, which requires that on the date of application the person be a citizen, refugee, or asylee (all not applicable to Ms. S) **or** "an alien lawfully admitted for permanent residence in the United States." The Division contends that she does not meet this criterion.

In *State, Dep't of Revenue v. Andrade*,[6] the Alaska Supreme Court has held that the phrase "an alien lawfully admitted for permanent residence in the United States" does not require that the alien actually be admitted permanently. Instead, it means only that the alien must "be legally present in Alaska and able to form the requisite intent to remain in Alaska."[7] By treaty (the COFA), Micronesians such as Ms. S are "legally present."[8] As for ability to form "the requisite intent," the Court has explained that one has this ability if one's immigration status is not in one of the categories where admission to the country is conditioned on intent not to abandon one's foreign residence.[9] The COFA has no such condition. On the contrary, it expressly allows Micronesians to "establish residence" as nonimmigrants in the United States,[10] and—as the Ninth Circuit Court of Appeals held only last year—aliens admitted under the

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4 Ex. 1, p. 3.

5 Ex. 6, pp. 6, 8, 10.

6 23 P.3d 58, 80-81 (Alaska 2001).

7 *Id.* at 80-81.

8 *See* COFA § 141(a) (as amended in 2003) (http://uscompact.org/files/FSM%20Publications/Compact%20Documents/Amended%20Compact%20Act.pdf).

9 *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).

10 COFA § 141(a).

COFA "are entitled to reside in the United States as nonimmigrants indefinitely."[11] The COFA neither provides nor precludes that such residency be accompanied by intent to remain.[12] Although residence under COFA is not sufficient, by itself, to support naturalization as a U.S. citizen,[13] it is not a casual or inherently temporary form of residency. It is, for example, sufficient to make most Micronesians residing in the United States subject to military draft.[14]

In light of the authorization for them to "establish residence" and "reside . . . indefinitely," it would appear that individuals such as Ms. S are "legally present in Alaska and able to form the requisite intent to remain in Alaska." This is the entirety of the test laid down in *Andrade* for a person to meet the criterion in 43.23.005(a)(5),[15] and it would appear to be completely dispositive of this case. The PFD Division has raised two potential counterarguments, which will be addressed briefly.

First, the Division points out that the COFA must be renegotiated from time to time and re-authorized by Congress, and that the current 20-year iteration of the COFA will expire in 2024. The Division reasons that because there is no guarantee that the United States and Micronesia will remain in their special relationship forever, a Micronesian cannot legally form the intent to remain in Alaska indefinitely. This argument proves too much. If absolute and eternal certainty that the underlying immigration laws would never change were required, *none* of the alien classes long recognized as eligible for PFD residency under AS 43.23.005(a) and 15 AAC 23.154 would be able to form the requisite intent, because as long as they are not citizens Congress could always change their immigration status and end their right to remain in the country. It is enough that the law *presently* allows those admitted under the COFA "to reside in the United States … indefinitely." If the law changes in 2024, the PFD status of the individuals admitted under the COFA may change as well.

Second, the Division points out that Ms. S has not taken a "significant step" to convert her immigration status within the meaning of Revenue regulation 15 AAC 23.154(d). That regulation provides:

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11 *Korab v. Fink*, 748 F.3d 875, 880 n.5 (9th Cir. 2014).

12 COFA § 141(e)(1).

13 COFA § 141(h).

14 COFA § 341.

15 23 P.3d at 80-81.

> 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.

The Division's argument is mistaken because this regulation does not apply to Ms. S. It only applies to individuals (such as H-1B visa holders) who have been assigned "a nonimmigrant status allowing only a limited stay in the United States." Ms. S has not been assigned such a status; rather, she already has "indefinite status" pursuant to her admission under the COFA.

This decision does not suggest that the State of Alaska *could* not exclude residents present under the COFA from eligibility for the PFD. They are excluded from some other programs, such as Alaska Medicaid.[16] This decision holds only that they are not excluded from eligibility under the current PFD statute and regulations.

B. S Children

The sole reason for declining to permit Ms. S to sponsor her children's application was the Division's belief that Ms. S was not herself eligible for a dividend (in general, sponsors must be eligible themselves[17]). Since she is eligible, she is an appropriate sponsor and the applications she has made on their behalf should be granted.

IV. Conclusion

Because the sole basis for denying Ms. S's application rested on an erroneous reading of the law and was mistaken, she is entitled to a 2014 Permanent Fund Dividend. Because she is eligible, her children have an eligible sponsor and are likewise eligible.[18]

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16 *See In re M.K.D.*, OAH No. 14-0641-MDE (Kennedy, ALJ, for Commissioner of Health & Soc. Serv., adopted July 8, 2014). States vary in how they treat COFA residents for Medicaid and Medicaid-like benefits. *See, e.g.*, Hawaii Dep't of Human Services, "COFA Residents and Health Care Assistance in Hawaii" (http://humanservices.hawaii.gov/wp-content/uploads/2014/11/COFA-Background-Memo.pdf).

17 *See* 15 AAC 23.113(b)(1).

18 The Division indicated at the hearing that it might pay the children's dividends through a substitute sponsor, such as an uncle. If this has already occurred, the Division's obligations to the children under this decision are fulfilled.

V. Order

IT IS HEREBY ORDERED that the decision of the Permanent Fund Dividend Division to deny the applications of F, J, B, and L S for a 2014 Permanent Fund Dividend is REVERSED.

IT IS FURTHER ORDERED that the applications of F, J, B, and L S for a 2014 Permanent Fund Dividend be GRANTED.

DATED this 9th day of February, 2015.

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 9th day of March, 2015.

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

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