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

In the Matter of	)	
	)	
L Q & C AND M Q (MINORS)	)	OAH No. 16-1491-PFD
	)	Agency No. 2016-064-6193/94/95

DECISION

I. Introduction

L Q's application for a 2016 Permanent Fund Dividend was denied, and, because Ms. Q was the listed sponsor on the PFD applications for her minor daughters, C and M Q, their applications were denied as well. Ms. Q appeals the denial of all three applications. This decision concludes that Ms. Q's immigration status at the time of her application rendered her ineligible as a matter of law for the 2016 dividend, and, further, precluded her from serving as the sponsor for her daughters' 2016 dividend applications. The Division's decision is therefore upheld.

II. Facts

A. Background

L Q is a native and citizen of Mexico who has lived in Alaska for more than five years.[1] Ms. Q relocated to Alaska in 2011, shortly after marrying her now-estranged husband, K Q, who is an Alaska resident.[2] The Qs have two children, M (born in December 2011) and C (born in September 2013). M and C were both born in Alaska and are U.S. citizens, while, as noted, Ms. Q is not.[3]

Ms. Q most recently entered the United States on a B-2 visitors' visa in September 2011.[4] By statute, the visitor's visa is available to a non-citizen "having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure[.]"[5]

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1 Ex. 1, p. 3; Ex. 8, p. 37; Ex. 10, p. 5.
2 Ex. 1, p. 3; Ex. 4, p. 2; Ex. 8; Ex. 10, p. 5; Ex. 14; Q testimony.
3 Ex. 1, pp. 6, 9.
4 Ex. 8, p. 26; Q testimony.
5 8 U.S.C. § 1101(a)(15)(B). While a visitor's visa is valid for up to ten years, individual visits generally may not exceed one year, although visitors may be granted extensions of temporary stay in 6-month increments. 8 C.F.R. § 214.2(b)(1).

Although Ms. Q entered the U.S. on a visitor's visa, non-citizens who marry U.S. citizens may petition for a change in immigration status through a process in which their spouse sponsors the petition.[6] However, such a petition must be filed by the U.S. citizen spouse, and Mr. Q never filed such a petition on Ms. Q's behalf.[7]

Ms. Q contends that Mr. Q used her uncertain immigration status as a means to control her in an abusive relationship.[8] Because of the potential for such tactics by abusive spouses, federal law provides several mechanisms for immigrants who become victims of domestic violence to apply for legal immigration status. One such route to legal immigration status for domestic violence victims is an I-360 "self-petition for legal status," available to a non-citizen spouse who "has been battered or has been the subject of extreme cruelty perpetrated by" the citizen spouse.[9] Whereas adjustment of immigration status typically depends upon the petition of a sponsoring citizen, the I-360 self-petition allows domestic violence survivors to "self-petition" to adjust their status.

In 2014, Ms. Q and her two children moved out of the family home, and Ms. Q began pursuing the lengthy process of adjusting of her immigration status through the domestic violence survivor provisions.[10] With the help of an immigration attorney she had hired in early 2014, Ms. Q filed a Form 1-360 "Self-Petition for Special Immigrant Visa" in February 2015.[11] The application was approved on December 7, 2015, and in March 2016 Ms. Q, again through counsel, submitted a Form I-485 "Application to Register Permanent Residence or Adjust Status" and an I-765 "Application for Employment Authorization."[12] Ms. Q's Application for Employment Authorization was approved in August 2016.[13] Her

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6 *See generally*, 8 C.F.R. § 214.2(k)(7), (10); INA Sec. 101(a)(15)(k)(kk)

7 8 C.F.R. § 214(k)(1)(i)(A).

8 Ex. 4, p. 2; Q testimony. In its post-hearing briefing, the Division argues that Ms. Q might not have expected Mr. Q to do so because Mr. Q had a criminal history that, the Division asserts, would preclude him from filing such a petition. The Division's exposition of federal law in this area is unconvincing. In any event, its post-hearing speculation about Ms. Q's state of mind is not supported by admissible evidence. I do not rely on it in resolving this appeal.

9 *See* 8 U.S.C.A. § 1154(a)(1)(A)(iii).

10 Ex. 8, p. 10. Ms. Q hired immigration attorney Margaret Stock to assist her with her adjusting her immigration status. Ex. 7, p. 2. Records received from Ms. Stock's office indicate that Ms. Stock began working with Ms. Q on a "self-petition for special immigrant visa" in late April 2014. Ex. 7, p. 3; Ex. 8, pp. 1-2. The time-consuming process of gathering and preparing materials in support of this application continued throughout the fall and into the winter of 2014. Ex. 7, p. 4; Ex. 10, p. 2.

11 Ex. 8, pp. 4, 7-18. The form indicated that Ms. Q was applying as "a self-petitioning spouse of an abuser." Ex. 8, p. 10.

12 Ex. 8, pp. 4, 21-22, 26-31, 37.

13 Ex. 8, p. 39-42.

application for permanent resident status was still pending at the time of the evidentiary hearing in this matter.

B. 2016 PFD application and Division response

Prior to the application giving rise to this appeal, Ms. Q had never applied for a Permanent Fund Dividend.[14] M and C have each received a PFD every year since birth.[15] On March 29, 2016, Ms. Q submitted an application for the 2016 PFD, along with applications for M and C.[16] Ms. Q's application indicated that she was not a U.S. Citizen, provided her "alien registration number," and indicated that she held an IB1/B2 visa with an expiration date of January 17, 2021.[17]

In a notice issued in May 2016, the Division denied Ms. Q's application on the basis that she "was not a citizen, or alien lawfully admitted for permanent residence in the United States, or an alien with refugee status, or an alien with asylee status prior to January 1, 2015."[18] The Division also denied the applications Ms. Q had submitted on behalf of M and C on the basis that neither girl had an "eligible sponsor" in light of the denial of Ms. Q's application.[19]

Ms. Q filed an informal appeal.[20] On the issue of her immigration status, she wrote that she had been "grant[ed] deferred action under [the] Violence Against Women Act," and explained that she had been working to remedy her status.[21] Ms. Q also argued that she was an Alaska resident, having not left the state since September 2011, and urged that not receiving a PFD was a hardship for her and her children, noting their total household income for the last year was less than $10,000.[22]

During the informal appeal process, the Division asked Ms. Q to provide evidence relating to her immigration status and the timeline of her efforts to remedy it.[23] In response to those inquiries, Ms. Q's immigration attorney sent the Division two letters and numerous

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14 Ex. 1, p. 5.
15 Ex. 1, pp. 8, 11.
16 Ex. 1.
17 Ex. 1, pp. 1-2.
18 Ex. 3, p. 1.
19 Ex. 3, pp. 5, 8.
20 Ex. 4.
21 Ex. 4, p. 2 ("Immigration is taking so long. We suffer domestic violence for 4 years. We are free of that now. My ex-husband never want[ed] to fix my immigration status to that way control me. I start the process by myself. I'm on last [phase] just waiting for work permit.").
22 Ex. 4, p. 2.
23 Ex. 6, p. 2.

documents addressing, as requested, the timeline and content of her firm's work on Ms. Q's behalf.[24]

The Division issued an informal appeal decision upholding the denial.[25] The informal appeal decision identified as the sole "issue" that Ms. Q neither had the requisite immigration status, nor had "taken any significant steps" to obtain that status prior to the start of the qualifying year.[26] After stating that the denial would be upheld, the informal appeal decision read:

> I made this decision because:
>
> Issue A: You were not a citizen of the United States, an alien lawfully admitted for permanent residence in the United States, an alien with refugee status under federal law, an alien that has been granted asylum under federal law, nor had you taken any steps to become a permanent resident of the United States prior to January 1, 2015.[27]

The decision then set out nine "factual findings," which included that Ms. Q did not hold a permanent immigration status, had not taken "a significant step" to adjust her immigration status prior to January 2015, and did not meet the legal definition of "state resident." The decision then closed by informing Ms. Q that "to have this decision reversed," she must submit:

> Proof that, prior to January 1, 2015, you were an alien lawfully admitted for permanent residence in the United States, or an alien with refugee status under federal law, or an alien that had been granted asylum under federal law, or that you took a significant step, including the filing of a petition with the USCIS, to convert or adjust your status to permanent or indefinite before January 1, 2015.[28]

The Division also upheld the denials as to M and C on the basis that they did not have an eligible sponsor.[29]

Ms. Q requested a formal hearing to challenge all three denials.[30] In her appeal request, Ms. Q described steps she had taken to remedy her immigration status, insisting

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24 *See* Ex. 7; Ex. 8.

25 Ex. 9.

26 Ex. 9, p. 1.

27 Ex. 9, p. 1. (The decision identified no "Issue B").

28 Ex. 9, p. 2 (emphasis added). While not dispositive in this appeal, the Division is reminded that its statement that proof must be submitted with the appeal form is legally incorrect. OAH management has previously asked the PFD Division to alter the preamble of the quoted language and has received assurance that the change will be made.

29 Ex. 9, pp. 5-6, 8-9.

that she had hired a lawyer in 2014 to "help me do all [in] my power to fix my immigration situation."[31] The hearing was held on February 15, 2017. Ms. Q appeared in person and represented herself. The Division was represented by Peter Scott, who participated telephonically.[32] After post-hearing briefing, the record closed on March 15, 2017.[33]

III. Discussion

A. Overview of eligibility criteria

To be eligible for a PFD, an individual must meet each of seven criteria set out in AS 43.23.005(a). Two of these criteria are at issue in this appeal – (a)(3), which requires that the applicant have been "a state resident during the entire qualifying year," and (a)(5), which requires that on the date of the application the person be a citizen, a refugee, an asylee, or "an alien lawfully admitted for permanent residence in the United States."[34]

The Department has adopted regulations to assist in its administration of the PFD program, including 15 AAC 23.154, pertaining to the determination of eligibility for non-citizens. The majority of that regulation's subsections deal with criterion (a)(5) – whether a non-citizen applicant is considered "an alien lawfully admitted for permanent residence," or has an otherwise qualifying immigration status. Thus, 15 AAC 23.154(a) identifies immigration statuses which satisfy this criterion, while subsection 154(b) provides that:

> The department will not consider an alien to be lawfully admitted for permanent residence if the USCIS assigns the alien a status that requires the alien to declare that the alien has a residence in a country other than the United States.

And subsection 154(e) provides that "[a]n alien seeking eligibility under this section has the burden of proving that on the date of the dividend application the alien was lawfully admitted for permanent residence as described in (a) of this section, granted asylum[,] or granted refugee status[.]" These three subsections all address the "immigration status" eligibility component found in AS 43.23.005(a)(5).

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30 Ex. 10.

31 Ex. 10, p. 2.

32 Division employee Fidel Morfin attended the hearing in person.

33 *See* Order on Post-Hearing Briefing, issued February 16, 2017. When the Division submitted its post-hearing briefing on March 6, 2017, it also requested to submit 63 pages of additional exhibits. An order was then issued allowing Ms. Q time to respond. While the supplemental exhibits are hereby admitted in the interest of completeness, they do not control the outcome of this appeal.

34 43.23.005(a).

Two other subsections of the regulation address a different criterion: whether, under AS 43.23.005(a)(3), an applicant "was a state resident during the entire qualifying year." First, subsection 154(c) provides:

> 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[,] or granted refugee status[.][35]

Next, subsection 154(d), 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.[36]

Although this "significant step" requirement references actions an applicant has taken relating to his or her immigration status, the significance of such actions, for PFD eligibility purposes, relates to whether the applicant – who still must separately meet the requirements of AS 43.23.005(a)(5) – has met the "state residency" requirements of AS 43.23.005(a)(3).

B. Ms. Q was not an eligible alien for purposes of PFD eligibility at the time of her application

Each of the separate requirements of AS 43.23.005 is mandatory. Failure to satisfy any of these criteria precludes an applicant from receiving a dividend. The Division's initial denial notice to Ms. Q informed her that her application was denied based on AS 43.23.005(a)(5), which requires that, in order to be eligible, an applicant must either be a citizen, a refugee, an asylee, or "an alien lawfully admitted for permanent residence in the United States."[37] Ms. Q is not a citizen, does not have refugee status, and has not been granted asylum. The question for purposes of (a)(5) eligibility is whether, at the time of her application, Ms. Q was "lawfully admitted for permanent residence in the United States."

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35 15 AAC 23.154(c).
36 15 AAC 23.154(d).
37 AS 43.23.005(a)(5).

The Department's regulations provide that:

> The department will not consider an alien to be lawfully admitted for permanent residence if the USCIS assigns the alien a status that requires the alien to declare that the alien has a residence in a country other than the United States.[38]

It is undisputed that Ms. Q entered the United States on a visitor's visa, which is only available to a non-citizen "having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure[.]"[39] While Ms. Q has since applied to convert her immigration status, that application is still pending. Because at the time of her PFD application Ms. Q still held only a visitor's visa, she does not meet the requirements of AS 43.23.005(a)(5). She is therefore ineligible for a 2016 PFD.

To be sure, Ms. Q may well meet the *state residency* criterion in AS 43.23.005(a)(3), because the act of engaging an attorney to work on her visa status can qualify as a "significant step" to convert her visa status.[40] But as noted above, she must meet both AS 43.23.005(a)(3) and AS 43.23.005(a)(5). The particular characteristics of her visa prevented her from meeting the latter criterion.

C. Notice issues

1. The Division's informal appeal decision erroneously told Ms. Q that she would be found eligible if she could show she had taken a significant step towards adjusting her immigration status during the qualifying year.

The Division's informal appeal decision significantly and unduly complicated this matter by erroneously telling Ms. Q that she could prevail on appeal by showing *either* a qualifying immigration status *or* that she had taken a "significant step" towards such status.[41] Because the "significant step" inquiry is only relevant to the residency criteria under (a)(3), a showing that she took a significant step to adjust her immigration status during the qualifying year would be (and is) immaterial to her continued ineligibility under (a)(5).

2. Notice issues raised by the administrative law judge

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38 15 AAC 23.154(b)
39 8 U.S.C. 1101(a)(15)(B).
40 *In re O.Y.*, OAH No. 07-0723-PFD (Comm'r of Revenue 2008).
41 See Ex. 9, p. 2.

The Division was asked to address in post-hearing briefing the implications of its inclusion of (a)(3) factors in its informal appeal decision – and, specifically, its instruction to Ms. Q that "to have this decision reversed" she must submit proof of either qualifying immigration status or a significant step towards achieving such status.[42] The Division's response argued, somewhat remarkably, that the administrative law judge could not properly raise this issue. The Division's argument is mistaken, for several reasons.

First, by its very nature, the purpose of an administrative appeal is to ensure the best final agency decision. The administrative law judge acts on behalf of the Commissioner to ensure that the agency has not erred in its preliminary processes, and to remedy, where possible, errors that may have occurred.[43] The administrative law judge would be remiss in those obligations were she to ignore frank errors in the agency's notice.

Second, the Division is incorrect in suggesting that the record in this matter does not implicate estoppel issues warranting review before the issuance of a final administrative decision. That Ms. Q, a self-represented litigant pursuing an appeal in her second language, did not utter the words "reliance" or "estoppel" during the hearing is not determinative. The Division told Ms. Q that she could have the denial reversed if she submitted evidence that she had taken a significant step towards adjusting her immigration status prior to January 1, 2015.[44] Ms. Q responded with a formal appeal request squarely focused on what steps she had taken to remedy her immigration status during the qualifying year.[45] Ms. Q's request for formal appeal was focused solely on actions she had taken to remedy her immigration status during 2014 – that is, specifically addressing the "significant step" inquiry the Division's informal appeal decision had raised. Indeed, it is certainly possible that Ms. Q might not have pursued an appeal had the Division not erroneously instructed her that she could have its decision reversed by showing that she had taken a significant step towards remedying her immigration status.

Nor is it significant that a prior OAH decision in another case failed to note this defect in the Division's notice. The Division points out that it previously used identical

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42 Order on Post-Hearing Briefing.
43 *See generally, Smart v. State, Dep't of Health and Social Services*, 237 P.3d 1010, 1015.
44 Ex. 9, p. 2.
45 Ex. 10, p. 2.

language in the informal appeal decision that gave rise to the appeal in *In re: H.P.*,[46] and that the decision in that appeal did not raise the concern being raised here.[47] A purpose of the administrative appeal process is to allow agencies to correct their errors, however belatedly. Neither the Division's historical use of a confusing and legally incorrect notice, nor the failure of a prior Department of Revenue decision to address the problems associated with this practice, preclude addressing these issues in this case. The Division's notices should not conflate the eligibility standards under (a)(3) and (a)(5), and the Division should not tell an applicant who is ineligible under (a)(5) that the denial will be reversed if they can satisfy the criteria of (a)(3).

3. Why the Division's incorrect statement at the informal appeal level does not entitle Ms. Q to a 2016 Dividend

The Division erred in telling Ms. Q that the denial of her application would be reversed if she could satisfy the (a)(3) eligibility criterion of showing a substantial step towards remedying her immigration status. But did the Division's erroneous statement entitle Ms. Q to a 2016 PFD? This decision concludes it did not.

As the Division concedes, governmental agency may, in some circumstances, be estopped from acting contrary to a position it has previously taken. The Alaska Supreme Court has set out a four-factor test for the application of this doctrine of equitable estoppel.

> Estoppel may apply against the government and in favor of a private party if four elements are present: (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.[48]

Here, the first element is plainly present. The division asserted a position when it told Ms. Q that the denial would be reversed if she showed she had taken a substantial step towards remedying her immigration status.[49] And Ms. Q appears to have relied on that position when she filed an administrative appeal based on evidence that she had indeed taken a substantial step during the qualifying year.[50]

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46 OAH Case No. 11-0088-PFD (Comm'r of Revenue 2011).
47 *See* Division's post-hearing brief, p. 5; Ex. 20.
48 *Crum v. Stalknaker*, 936 P.2d 1254, 1257 (Alaska 1997).
49 Ex. 9, p. 2.
50 Ex. 10, p. 2.

But even if Ms. Q relied on the Division's statement in the informal appeal decision, the evidence does not support a finding in favor of the third element – that Ms. Q was prejudiced by her reliance on the Division's position. The only action Ms. Q took was filing this administrative appeal. This is not a case where the statement at issue is alleged to have altered an applicant's behavior in a way that could in fact affect their underlying eligibility.[51] Such reliance might exist, for example, if an applicant relied on statements by a division employee about the permissible length of absence from the state during the qualifying year.[52] If an applicant could show that such statements were made and relied upon to the applicant's detriment – i.e., that the applicant, by following the advice, exceeded the permissible length of absence during the qualifying year – reliance would be shown. Here, though, the Division's statements were made *after* the qualifying year, and cannot have altered Ms. Q's actions in ways that meaningfully affected her actual legal eligibility for the 2016 Dividend. For this reason, the erroneous statements in the informal appeal decision do not estop the Division from denying Ms. Q's application.

D. Was the Division correct to deny the applications submitted on behalf of M and C?

In addition to appealing the denial of her own application, Ms. Q also appeals on behalf of her daughters. As noted, M and C have lived in Alaska their entire lives and have received PFDs each year, but 2016 was the first year that Ms. Q applied as their sponsor. After denying Ms. Q's application, the Division denied the applications submitted on behalf of M and C because they lacked an eligible sponsor.

The controlling regulation, 15 AAC 23.113, provides that a child who otherwise qualifies for a dividend is eligible to receive one only if the child is "(1) in the lawful and physical custody of an individual who meets the requirements of [15 AAC 23.113(c)(1)] and who [is] eligible for the dividend[.]"[53]

There is no dispute that the girls are in Ms. Q's lawful and physical custody. The regulation next states that Ms. Q must "meet the requirements of" 15 AAC 23.113(c)(1), which are as follows:

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[51] *See In re: G.C.*, OAH Case No. 09-0436-PFD (Comm'r Revenue 2010).

[52] *See In re: S.D.*, OAH Case No. 11-0294-PFD (Comm'r Revenue 2011) (declining to apply doctrine of equitable estoppel because applicant did not meet burden of proving he was told by Division that he did not need to return to state for 72 consecutive hours).

[53] 15 AAC 23.118(b). There are certain exceptions to the eligibility requirements listed in (b)(1)(A), but none of these apply here.

An application for a dividend may be filed on behalf of a child only by

(1) A sponsor who is:

(A) A natural or adoptive parent of the child; [OR]

(B) The legal guardian of the child; [OR]

(C) A minor parent of the child; [OR]

(D) [A]n authorized representative, if the authorized representative demonstrates to the satisfaction of the department that a need exists to sponsor the child, and the child does not have a sponsor under (A)-(C) of this paragraph; an authorized representative applying on behalf of a child must have had lawful and physical custody of the child at the time of the application and for the majority of the qualifying year, or must be applying with a court order.

Ms. Q satisfies the requirements of 15 AAC 23.113(c)(1) – she is the natural parent of both girls. But under 15 AAC 23.113(b), a sponsor must also satisfy a third criteria – his or her own independent eligibility for the dividend. It is this requirement that is determinative here. Because Ms. Q is not eligible for her own dividend, she is not an "eligible sponsor."

Under 15 AAC 23.113(b), Ms. Q's own ineligibility for a dividend precludes the girls from receiving a 2016 dividend at this time.[54] However, M and C may each reapply for their 2016 dividends between their 18th and 20th birthdays.[55] The children will need to establish that they would have been eligible for a 2016 PFD had an eligible sponsor filed an application on their behalf. Because the opportunity to reapply is lost upon reaching 20 years of age, Ms. Q should remind each child to apply immediately after her eighteenth birthday.

IV. Conclusion

Because Ms. Q is not eligible for a 2016 dividend, and no substitute sponsor has been identified for M and C, the Division's decision is upheld. However, pursuant to 15 AAC 23.133, C and M may reapply for their 2016 dividends between their 18th and 20th birthdays.

Dated: March 22, 2017

Signed
Cheryl Mandala
Administrative Law Judge

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[54] Where a child's original sponsor is determined to be ineligible, a substitute sponsor may replace the original sponsor, provided that the substitute also meets all the requirements of a sponsor. 15 AAC 23.123(h); 15 AAC 23.993. Here, no such qualifying individual has been identified. While Ms. Q mentioned her ex-stepfather-in-law, he does not have custody of the children, so could only serve as a substitute sponsor if a court order authorized him to do so, as provided in the final clause of 15 AAC 23.113(c)(1).

[55] 15 AAC 23.133

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 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 April, 2017.

By: *Signed*
Signature
Jerry Burnett
Name
Deputy Commissioner
Title

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