

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

In the Matter of	)	
	)	
H. D.	)	
	)	OAH No. 15-0286-PFD
<u>2014 Permanent Fund Dividend<sup>1</sup></u>	)	Agency No. 2014-041-8878

**CORRECTED DECISION**

**I. Introduction**

H. D. appeals the Permanent Fund Dividend Division’s denial of his application for a 2014 Permanent Fund Dividend (PFD). A telephonic hearing was held May 5, 2015. H. D. and B. T., his supervisor, testified on H. D.’s behalf. Pete Scott, PFD Specialist, presented the PFD Division’s position.

**II. Facts**

The facts of this matter are undisputed. H. D. is a Canadian citizen, born in China, currently working in the U.S. under the North American Free Trade Agreement (NAFTA). H. D. works for Employer A in Office A. He began employment with Employer A in 2007 and plans to continue working there indefinitely.

H. D. held an H1B Non-immigrant visa from October 1, 2007 through September 30, 2013.<sup>2</sup> H1B visas are valid for a six year maximum.<sup>3</sup> H. D. held a B2 Tourist from October 20, 2013 through November 12, 2013.<sup>4</sup> Because H. D. could not work under the tourist visa, Employer A contracted law firm No Name to assist H. D. in obtaining a visa status which allowed his return to work.<sup>5</sup> H. D. currently holds a NAFTA TN visa that is valid from November 27, 2013 through November 26, 2016.<sup>6</sup>

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<sup>1</sup> The original decision contained an error, citing 2008, not 2014. This is the only correction to the decision.

<sup>2</sup> Ex. 16.

<sup>3</sup> 8 CFR § 214.2(h)(15)(ii)(B)(1).

<sup>4</sup> Ex. 16.

<sup>5</sup> Exhibit 14.

<sup>6</sup> Ex. 2, p.4. The TN ending date may change with each entry into the U.S. See Ex. 16. For purposes of this decision, it is important that H. D. holds a current TN visa. Because H. D. plans to continue employment with Employer A and TN visas may be continually renewed, its ending date is not of particular importance.

H. D. first applied for the PFD in 2009, and was initially denied. However, H. D.'s denial was overturned through the OAH appeals process. The decision held H. D. had manifested the intent to remain in Alaska and take a significant step to obtain permanent or indefinite resident status under his H1B visa status, thus qualifying him for the PFD.<sup>7</sup> The Division approved H. D.'s 2010 through 2013 PFD applications.<sup>8</sup> The Division denied H. D.'s 2014 PFD application.<sup>9</sup> On March 1, 2015, the Division upheld its denial through its internal informal appeals process.<sup>10</sup>

The Division denied H. D.'s application because: (1) he did not have the intent to remain in Alaska and to make a home in Alaska prior to January 1, 2013; (2) he was not an alien lawfully admitted for permanent residence...nor had he taken any steps to become a permanent resident of the U.S.; and (3) he does not meet the definition of "state resident" for purposes of the PFD program.<sup>11</sup> H. D. appealed, arguing that he intends to remain in Alaska indefinitely, and has done so for the past eight years.<sup>12</sup> H. D. and B. T. testified credibly that H. D. plans to pursue permanent residency and will engage law firm No Name to assist.

### **III. Discussion**

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>13</sup> The qualifying year for the 2014 PFD is 2013.<sup>14</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>15</sup> Under federal law, H. D.'s TN visa status precludes him from legally forming the intent to remain in Alaska, required for PFD eligibility.

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<sup>7</sup> Ex. 9; *In re: H. D.*, OAH No. 10-0040-PFD (OAH 2010).

<sup>8</sup> Ex. 1.

<sup>9</sup> Ex. 4.

<sup>10</sup> Ex. 6.

<sup>11</sup> Ex. 6.

<sup>12</sup> Ex. 7.

<sup>13</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>14</sup> AS 43.23.095(6).

<sup>15</sup> AS 01.10.055(a).

Under NAFTA a Canadian citizen may seek temporary entry to the U.S. for employment purposes.<sup>16</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>17</sup> Because H. D.’s TN visa allows only temporary entry, he is not permitted for permanent entry. His TN temporary status, “without the intent to establish permanent residence,” also means that H. D. cannot legally form the intent to establish permanent domicile in the U.S.<sup>18</sup> To obtain entry under NAFTA, H. D. was required to demonstrate that his work would end at a predictable time and that he would depart upon completion of his work.<sup>19</sup>

As noted, H. D.’s current TN visa does not allow him to be admitted for permanent residence, unlike his former H1B visa. Under federal law, H. D. cannot form the requisite intent to remain in Alaska indefinitely because, unlike some “dual intent” visas, a TN visa does not allow the holder to pursue a permanent domicile in the U.S.<sup>20</sup> Dual intent allows a foreign national to pursue permanent residency without violating his temporary immigration status.<sup>21</sup> H1B visas allow for dual intent, but TN visas do not.<sup>22</sup>

H. D. asserts that he can renew his TN visa status indefinitely, and wishes to remain in Alaska indefinitely. His employer also plans to employ him indefinitely.<sup>23</sup> H. D. also purports to demonstrate the intent to remain by retaining law firm No Name for

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<sup>16</sup> 8 CFR §214.6(a).

<sup>17</sup> 8 CFR §214.6(b).

<sup>18</sup> 8 CFR §214.6(b); *State v. Andrade*, 23 P.3d 58, 69 (Alaska 2001) (noting that certain immigration status have federal restrictions on an alien’s ability to form intent to remain are able to form the intent to remain in Alaska. Aliens without restrictions on their ability to form intent may be eligible for PFD)

<sup>19</sup> 8 CFR §214.6(b).

<sup>20</sup> *Andrade*, 23 P.3d at 72-73 (Alaska 2001).

<sup>21</sup> 8 CFR §214.2(h)(16)(i); *Nonimmigrant Employment-Based Visas*, Angelica Ochoa, 41-FEB, Colo. Law.27 (2012).

<sup>22</sup> *dePape v. Trinity Health Systems, Inc.* 242 F.Supp.2d 585, 593-94 (N.D. Iowa 2003); *Nonimmigrant Employment-Based Visas*, Angelica Ochoa, 41-FEB, Colo. Law.27 (2012); *Re-bending the Paperclip: An examination of America’s Policy Regarding Skilled Workers and Student Visas*, Joseph Tiger, 22 Geo. Immigr. L.J. 507 (2008); <http://www.tnvisabulletin.com/applying-for-green-card-tn-st/>. Federal immigration policy regarding dual intent may change, but as of this decision, TN visa holders may not pursue permanency while maintaining their temporary status.

<sup>23</sup> H. D. and B. T. explained that H. D.’s PFD eligibility was not considered when he applied for and was approved for his TN visa. However, H. D. was no longer eligible for the H1B visa because of H1B’s six year maximum. The record does not contain evidence of another available status that would allow H. D. to work and enable him to have the intent to stay in Alaska.

work on his immigration status. However, these factors do not offset H. D.’s inability to form the intent to remain in Alaska under federal law.

H. D.’s inability to form intent to remain in Alaska under the TN visa also ends the PFD eligibility analysis. Because H. D.’s PFD must be denied on his inability to form intent to remain in Alaska, this decision does not analyze H. D.’s status as a “state resident.”<sup>24</sup>

Because of his TN visa status, whether or not H. D. takes significant steps toward permanent status is immaterial. H. D. may be able to demonstrate significant attempts to remain indefinitely or permanently, but he cannot overcome the federal restriction on his ability to intend to remain. In terms of future PFD eligibility, however, nothing in this decision precludes a finding that H. D. has taken a significant step towards converting or adjusting to permanent or indefinite status, through either a new position with Employer A or through pursuing a change in status with attorneys.

#### **IV. Conclusion**

H. D. is not eligible for the 2014 PFD. Accordingly, the Division’s decision to deny his 2014 application is affirmed. H. D. may again be eligible for the PFD if his visa status or immigration rules change.

DATED: August 10, 2015.<sup>25</sup>

*Signed*

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Bride Seifert

Administrative Law Judge

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<sup>24</sup> Neither the ALJ nor the Division has the discretion to ignore the federal preclusion on forming intent to remain or create an exception to rule, even if it appears to be “legal fiction” in H. D.’s case.

<sup>25</sup> The proposed decision date is August 10, 2015. The proposed and final decision dates remain the same even though a typo was corrected on page 1.

## 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 10<sup>th</sup> day of September, 2015.

By: Signed  
Bride Seifert  
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]