MEMORANDUM

State of Alaska
Department of Law

TO: Deborah Vogt
Deputy Commissioner
Department of Revenue

DATE: April 30, 1999

TEL.NO.: (907) 465-3600

FILE NO.: 663-99-0225

SUBJECT: Constitutionality of
15 AAC 23.153(a)

FROM: Stephen C. Slotnick
Assistant Attorney General
Commercial Section – Juneau

You have asked whether the regulation that governs the eligibility of aliens for permanent fund dividends is unconstitutional.[1] You have also asked whether, if this regulation is unconstitutional, the unconstitutionality can be corrected by an emergency repeal of the regulation and the adoption of an emergency regulation that conforms with the requirements of the law. We conclude that the regulation is unconstitutional because it conflicts with federal law. We further conclude that the Department of Revenue may cure the unconstitutionality through an emergency repeal of the existing regulation and adoption of a new regulation.

INTRODUCTION

Alaska residents may apply to receive a Permanent Fund Dividend (dividend) from the earnings of the Alaska Permanent Fund. AS 43.23.005. The Permanent Fund was established in 1977 to invest a portion of the state's earnings from its mineral resources. ALASKA CONST. art. IX, § 15. Over the years, the dividend has increased with the growth of the fund. In 1998, the dividend was $1,540.88.

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[1] Although only a court may declare a regulation or statute unconstitutional, the attorney general has authority to advise an agency regarding the validity of the agency's regulation. AS 44.62.060(b)(1). *See also, e.g.*, 1983 Inf. Op. Att'y Gen. (July 11; 366-688-83) (advising Department of Revenue not to enforce unconstitutional regulation). We have examined the regulations file on 15 AAC 23.153 and determined that in our initial review of this regulation, this office did not address the complex questions raised by the potential conflict with federal immigration law.

The eligibility requirements for a dividend are set out in statute and regulations. *See* AS 43.23; 15 AAC 23. To qualify for a dividend, an applicant must be a resident of the state and have been a resident during the previous calendar year. AS 43.23.005. A resident is defined as an individual who is physically present in the state with the intent to remain indefinitely in the state or who, if absent from the state, intends to return and remain indefinitely in the state. AS 43.23.095(7).

Not all residents will necessarily qualify for a dividend. For example, a resident who is absent from the state for more than 180 days will not receive a dividend unless that person can prove that he or she had an "allowable absence." AS 43.23.005(a)(6).

The issue under analysis here involves aliens — people who are not citizens of the United States. Alienage presents special issues of eligibility because the fact that an alien is a citizen of a different country may affect whether the alien can become a resident of the State of Alaska.

Under a statute adopted in 1991, an alien may receive a dividend if the alien is lawfully admitted for permanent residence in the United States, a refugee under federal law, or has been granted asylum under federal law. AS 43.23.005(a)(5). In 1993, the department adopted a regulation interpreting the phrase "lawfully admitted for permanent residence in the United States." 15 AAC 23.153(a).[2] The regulation interpreted the

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[2] 15 AAC 23.153 provides:

> (a) An alien who before January 1 of the qualifying year has been granted permanent resident status under 8 U.S.C. 1101(a)(20), refugee status under 8 U.S.C. 1157 and 8 U.S.C. 1159, or asylum under 8 U.S.C. 1158 and who otherwise qualifies is eligible for a dividend.
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> (b) An alien who has been granted conditional resident status meets the requirements of permanent resident status under (a) of this section.
>
> (c) An alien who does not fall within the provisions of (a) or (b) of this section is not eligible for a dividend.
>
> (d) A foreign-born child adopted by an eligible resident is not subject to this section.

statute as setting a bright-line test for eligibility of aliens.[3] In particular, the regulation defined the phrase "lawfully admitted for permanent residence in the United States," by reference to the *federal* requirements for "residing permanently in the United States as an immigrant." 8 U.S.C. § 1101(a)(20).

In 1998, for the first time, aliens came forward with information that raises questions about the constitutionality of the regulation. In a case that is currently styled as a class action, aliens who have not been eligible for dividends have asserted a number of legal challenges to the limitations on the ability of aliens to qualify for dividends. *See Andrade v. State, Dep't of Revenue,* Case No. 3AN-98-3398 Civil.

The strict definition in 15 AAC 23.153(a) is one of the issues brought to our attention, and gives rise to your current question. The regulation draws the line for Alaska residency at aliens who have "immigrant" status. As explained below, although the state may deny certain state benefits to some nonimmigrants, federal law does not allow states to draw the line for eligibility for dividends between "immigrants" and "nonimmigrants."

DISCUSSION

A. Federal law does not allow a state to deny a benefit to a nonimmigrant alien on the basis of the alien's immigration status if the alien has an immigration status that is consistent with the alien forming the intent to remain indefinitely.

Under the supremacy clause of the United States Constitution, article VI, clause 2, federal law will control over a state law that conflicts with federal law. *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Furthermore, if Congress has indicated an intent to "occupy the field," a state may be preempted from legislating on the subject that Congress has claimed for itself. *Id.*

The United States Supreme Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens." *Toll v. Moreno*, 458 U.S. 1, 10 (1982). "State laws which impose discriminatory burdens upon the

[3] An exception to this bright-line test is found in subsection (b) of 15 AAC 23.153, which provides that conditional resident status will meet the requirements of permanent resident status. In addition, AS 43.23.005 makes refugees and asylees eligible for dividends.

entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Takahashi v. Fish and Game Comm'n,* 334 U.S. 410, 419 (1948).

Although the states have no authority to regulate immigration, "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted." *De Canas v. Bica*, 424 U.S. 351, 355 (1976). Here, the question is whether 15 AAC 23.153(a) illegally "encroach[es] upon federal authority over lawfully admitted aliens." *Toll*, 458 U.S. at 12 & n.17.

That question is answered by two cases, *Toll* and *Elkins v. Moreno,* 435 U.S. 647 (1978). In *Elkins*, the Court examined the constitutionality of a University of Maryland policy that disallowed an in-state tuition discount to aliens who did not have permanent residence status. In analyzing federal immigration law, the Court explained that immigration law recognizes two classes of aliens, immigrants and nonimmigrants. 435 U.S. at 664. In general, immigrants are aliens who are admitted for permanent residence. *Id.* The number of immigrant visas allowed each year is limited by a quota system. *Id.* In contrast, nonimmigrants, who are admitted into this country as temporary visitors, are not subject to a quota. *Id.* The aliens in question in *Elkins* were nonimmigrants who held a "G-4" visa status.

After parsing the terms of the Immigration and Naturalization Act, 8 U.S.C. § 1101 *et seq.*, the Court determined that some classes of nonimmigrants could form the intent to remain indefinitely. *Id.* at 666. The Court noted that for some classes of nonimmigrants, "Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." *Id.* at 665. The Court further observed, however, that not all classes of nonimmigrants were subject to that restriction. The Court found that "Congress' silence is therefore pregnant" and, by use of a negative inference, concluded that Congress "was willing to allow nonrestricted nonimmigrant aliens to adopt the United States as their domicile." *Id.* at 666.

In *Elkins*, the Court never reached a final decision on the constitutionality of the denial of in-state tuition discounts to nonrestricted nonimmigrant aliens, such as the "G-4" aliens who had requested in-state status. The Court reserved that judgment for its second analysis of the same question in *Toll*. In *Toll*, the Court declared that "[i]n light of Congress' explicit decision not to bar G-4 aliens from acquiring domicile, the State's decision to deny 'in-state' status to G-4 aliens, *solely* on account of the G-4 alien's federal immigration status, surely amounts to an ancillary 'burden not

contemplated by Congress' in admitting these aliens to the United States." 458 U.S. at 14 (emphasis in original).[4]

In short, under federal law, a state cannot prohibit a nonrestricted nonimmigrant alien from becoming a domiciliary in the state on the basis of the alien's immigration status. A nonrestricted nonimmigrant alien who has lawfully formed the intent to remain indefinitely in the state is entitled to the same economic benefits as an immigrant alien. In this case, that includes the opportunity to prove that the alien is entitled to a dividend.

Under 15 AAC 23.153(a), a nonrestricted nonimmigrant alien is not eligible for a dividend because, by adopting the federal standard of 8 U.S.C. § 1101(a)(20), the regulation limits eligibility of noncitizens to those with immigrant status. This restriction is as much of an ancillary burden on immigration as a denial of in-state tuition to nonrestricted nonimmigrant aliens, which was at issue in the *Elkins* and *Toll* line of cases.[5] Accordingly, we conclude that the incorporation of 8 U.S.C. § 1101(a)(20) into state law by 15 AAC 23.153(a) conflicts with federal law and is unconstitutional.[6]

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[4] Although the Court purported not to decide whether nonrestricted nonimmigrants could establish domicile in a state, such a result follows from these cases. *Toll v. Moreno*, 397 A.2d 1009, 1018 (Ct. Ap. Md. 1979) ("[i]n light of the Supreme Court's interpretation of federal law, it is obvious that nothing inherent in the nature of a G-4 visa would render the holder of such visa absolutely incapable of establishing a Maryland domicile.").

[5] Given that no attorney in this office has significant expertise in immigration law, we hired an expert in immigration law, Wayne Smith, to orally advise us on the question you propounded. Mr. Smith formerly served as chief of staff to the California Attorney General. He was also special assistant to the Western Regional Director of the Immigration and Naturalization Service (INS) and handled labor-related issues with the INS as special assistant to the Director of the California Department of Food and Agriculture. Mr. Smith confirmed our conclusion.

[6] This analysis does not affect our view that federal law does not conflict with the requirement of 15 AAC 23.153(a) that an alien who has been granted a change in status must be in an eligible status for a full qualifying year before qualifying for a dividend. We do not analyze this issue here, however, because it will likely be addressed by the court in the *Andrade* matter.

B. The department may interpret AS 43.23.005(a)(5)(B) broadly to conform to the requirements of federal law.

The question you have asked about the constitutionality of 15 AAC 23.153(a) necessarily raises a question about the constitutionality of AS 43.23.005(a)(5)(B). If 15 AAC 23.153(a) embodies the only possible interpretation of AS 43.23.005(a)(5)(B), then the conflict would be with the statute, not the regulation. If this were the case, the conflict could not be cured by a repeal of 15 AAC 23.153(a) and adoption of a new regulation, because a regulation must be consistent with the statute that it interprets.

Here, however, the statutory phrase "lawfully admitted for permanent residence in the United States" is capable of more than one interpretation. The statute does not define the phrase "lawfully admitted for permanent residence in the United States." Without a definition, this phrase is ambiguous.

A broad construction of the phrase "lawfully admitted for permanent residence in the United States" would include an alien who holds a current immigration status that does not conflict with the alien's ability to form the intent to remain in the United States indefinitely. Such a construction would avoid a conflict with federal law and save the statute from a possible finding of unconstitutionality.

The plain language of the phrase clearly permits such a broad construction. In the context of trying to determine residency, courts construe "permanent" to mean "indefinite." *See Sudomir v. McMahon*, 767 F.2d 1456, 1461 (9th Cir. 1985) ("'permanently' does not mean 'forever'"); 8 U.S.C. § 1101(a)(31) ("The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from 'temporary,' but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law."). Therefore, for state law purposes, any nonimmigrant alien whose immigration status allows the alien to adopt the United States as his or her domicile, and who has, as a matter of law, adopted the United States as his or her domicile, is "lawfully admitted for permanent residence in the United States."

The canons of statutory construction also favor a broad construction of AS 43.23.005(a)(5)(B). A statute is presumed to be constitutional. *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979). Statutes should be interpreted in a manner that avoids a finding of unconstitutionality. *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*, 807 P.2d 487, 498 (Alaska 1991) ("statutes are to be construed to avoid a substantial

risk of unconstitutionality where adopting such a construction is reasonable"). Indeed, at least one administrative agency from another state has also had to adopt a limiting construction of a state statute in order to save the statute from conflicting with federal immigration law. *See De Canas*, 424 U.S. at 364 (to prevent conflict with federal immigration law, California Director of Industrial Relations adopted regulation defining phrase "alien entitled to lawful residence" to include alien with documents from INS that authorize alien to work).

Where laws appear to be in conflict, the interpreting authority should attempt to harmonize the laws to avoid the conflict. *C.f., e.g., Progressive Insurance Co. v. Simmons*, 953 P.2d 510, 516 (Alaska 1998) (conflict between statutes should be reconciled to produce harmonious whole); *Commercial Fisheries Entry Comm'n v. Apokedak*, 680 P.2d 486, 490 (Alaska 1984) ("courts must attempt to harmonize the specific provisions of an act with the legislature's expression of its intent"). Here, the task is to harmonize AS 43.23.005(a)(5) with federal law. As explained above, this is easily done by adopting a broad definition of the phrase "lawfully admitted for permanent residence in the United States."

The interpretation given AS 43.23.005(a)(5)(B), however, must be consistent with legislative intent. "The objective of statutory construction is to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others." *City of Dillingham v. CH2M Hill Northwest*, 873 P.2d 1271, 1277 (Alaska 1994). If the legislature intended the result that all nonimmigrant aliens be denied a dividend, then the department cannot adopt a regulation that would be contrary to that intent. *Muller v. BP Exploration (Alaska), Inc.*, 923 P.2d 783, 792 n.9 (Alaska 1996) ("regulation which differs substantively from the clear language of the statute . . . would be invalid").

The history of the statute indicates that a broad construction of AS 43.23.005(a)(5)(B) that comports with federal law would be consistent with legislative intent. The legislative history demonstrates that the main purpose of the legislature in adopting AS 43.23.005(a)(5)(B) was to prevent illegal aliens from receiving dividends. No evidence indicates that the legislature intended to violate federal law by denying dividends to otherwise eligible aliens who could form the intent to remain in Alaska indefinitely.

At the time of the adoption of AS 43.23.005(a)(5)(B), the department denied dividends to all illegal aliens. This practice had been challenged on appeal, and on December 13, 1990, the Alaska Superior Court declared invalid the regulation that

made illegal aliens ineligible for dividends, 15 AAC 23.615(d). *Cosio v. State,* No. 3AN-89-7128 (Alaska Superior Ct., Dec. 13, 1990).

This ruling — if not overturned by the Alaska Supreme Court or reversed by the legislature — would have allowed illegal aliens to receive dividends. The state had petitioned for review by the Alaska Supreme Court, but the court had not issued a decision by the time of the start of the 1992 legislative session. Although the Supreme Court eventually reversed the superior court, and held that the department's regulation was valid, *see State, Dep't of Revenue v. Cosio,* 858 P.2d 621, 626-29 (Alaska 1993), by the time the court issued its decision, the legislature had already adopted AS 43.23.005(a)(5)(B), and the department had promulgated 15 AAC 23.153(a). As the legislative history shows, the legislature took this action in 1992 because it was concerned about payment of dividends to illegal aliens.

In 1992, three bills were introduced that addressed the permanent fund dividend program. One of these, HB 428, amended AS 43.23.005(a) to include the requirement that an alien be lawfully admitted for permanent residence in the United States. HB 428 was later incorporated into a House committee substitute for SB 327, which passed the legislature on March 27, 1992, and was signed by the Governor on March 31. *See* HCS CSSB 327 (FIN) am H; sec. 4, ch. 4, SLA 1992.

HB 428 dealt with eligibility of residents whose spouses were nonresidents, and with the eligibility of aliens. The prime sponsor of HB 428 was Representative Max Gruenberg. The only significant comment on the portion of the bill dealing with alien eligibility occurred in a meeting of the House State Affairs Committee on February 3, 1992, when Representative Gruenberg explained that the bill "clarified that illegal aliens were not eligible." Minutes, House State Affairs Committee, Feb. 3, 1992, 8:30 A.M., log no. 146 (available at http://www.legis.state.ak.us/folhome.htm). This statement is strong evidence that the legislature intended only to legislate on the question of eligibility of illegal aliens and did not intend to violate federal law. *See Alaska Housing Finance Corp. v. Salvucci,* 950 P.2d 1116, 1125 n.10 (Alaska 1997) (court will give weight to statements by sponsors of a bill).

On March 26, 1992, the Department of Revenue prepared a sectional analysis of HB CSSB 327 (FIN) am H. Regarding section 4, which contained the provision on aliens, this analysis stated "[e]nsures illegal aliens are not eligible by specifically stating who is eligible. (From the Administration)" This indicates that the language regarding alien eligibility was prepared by the administration, and that the

administration informed the legislature that this language was intended to preclude illegal aliens from eligibility.

The only other piece of legislative history bearing on this subject is a January 27 sectional analysis of HB 428 by the Legislative Affairs Agency. Memorandum from Tamara Brandt Cook to Representative Max Gruenberg (Jan. 27, 1992). This memorandum explains that the bill "[a]dds the requirement that the person be a citizen of the United States, a resident alien, a refugee, or an alien that has been granted asylum." *Id.* "Resident alien" was a term that had been used by the department for many years to determine eligibility of aliens for dividends. *See* 15 AAC 23.165(d) (repealed 1993); 15 AAC 23.110(b) (repealed 1993); 15 AAC 23.125(a) (repealed 1993). Originally, "resident alien" was defined to mean "a person who is not a citizen or national of the United States but has been admitted to the United States for permanent residency." 15 AAC 23.600(15) (repealed 1989).

The department hearing decisions on the eligibility of resident aliens do not reflect a consistent interpretation of this phrase. *Compare* Hearing Decision No. 87-25 (nonimmigrant alien eligible for dividend) *with* Hearing Decision 89-078 (nonimmigrant alien who had not received permanent residency status by application date not eligible). Later regulations specifically added a statement that nonimmigrants were not eligible for dividends. 15 AAC 23.110(b) (repealed 1993); 15 AAC 23.125(a) (repealed 1993). This implies that such a limitation was not inherent in the requirement that aliens be "resident aliens" in order to qualify for dividends.

To the extent the legislature intended to make "resident aliens" eligible for dividends, that intent would be consistent with a legislative intent to comply with the requirements of federal immigration law. A "resident alien" is "[o]ne, not yet a citizen of this country, who has come into the country from another with the intent to abandon his former citizenship and to reside here." *Black's Law Dictionary* 1309 (6th ed. 1990). In other words, any alien—immigrant or nonimmigrant—who had the legal capacity to form the intent to remain indefinitely in Alaska could be a resident alien.[7]

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[7] Our conclusion that the legislature did not intend to violate federal law does not depend on a broad construction of the term "resident alien." Even if a court were to conclude that "resident alien" excludes nonimmigrants from eligibility, that would not mean that the legislature intended to exclude nonimmigrants, because the term "resident alien" appears only in a memorandum from the Legislative Affairs Agency, not in an expression of intent by a member of the legislature. Nevertheless, we find the term "resident alien" ambiguous, and conclude that

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Our research has revealed no additional items of legislative history that sheds light on the question of legislative intent in adopting AS 43.23.005(a)(5)(B). The testimony of Representative Gruenberg is the most valuable item of history, and that testimony clearly shows that the intent of the legislature was to make illegal aliens ineligible. The memoranda from the department and the legislative affairs agency are not declarations of legislative intent, but are consistent with the understanding that this would be the effect of the amendment. Certainly, no legislative history supports a conclusion that the legislature intended to incorporate federal definitions that would make the state statute unconstitutional.

In spite of this legislative history, the department adopted the federal definition of the phrase "lawfully admitted for permanent residence in the United States" when it promulgated 15 AAC 23.153(a). The department adopted this definition because AS 43.23.005(a)(5) tracks the language of the federal Immigration and Naturalization Act, which equates the phrase "lawfully admitted for permanent residence in the United States" to an alien with immigrant status. 8 U.S.C. § 1101(a)(20). Given the perfect match between AS 43.23.005(a)(5) and 8 U.S.C. § 1101(a)(20), the department in 1992 assumed that the legislature intended to deny dividends to all nonimmigrant aliens other than conditional residents, refugees, and asylees.

The department's construction of AS 43.23.005(a)(5) is understandable. The legislature has directed that "words and phrases shall be construed . . . according to their common and approved usage" but that words and phrases that "have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning." AS 01.10.040. A court might conclude that the phrase "lawfully admitted for permanent residence in the United States" has a peculiar and appropriate meaning as defined in the U.S. Code, and is therefore susceptible of only one interpretation.

Several factors cut against this view, however. The evidence of legislative intent indicates that the legislature was not considering federal law, but rather was legislatively reversing a superior court decision on the eligibility of illegal aliens. Legislative intent is more important than the federal definition of a particular phrase. *See*

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it can reasonably be construed to include nonimmigrants. *See In re Respondek* 442 So.2d 435 (La. 1983) (interpreting requirement that bar applicant be "resident alien" to mean "alien who is lawfully residing in the United States").

Underwater Construction, Inc. v. Shirley 884 P.2d 150, 153 (Alaska 1994) (in interpreting ambiguous statute, court will look to legislative intent, not federal law). Further, the legislature is presumed to have knowledge of the constitutional limits of state law. *See, e.g., Kimoktoak v. State,* 584 P.2d 25, 31 (Alaska 1978) ("the legislature, like the courts, is pledged to support the state and federal constitutions and . . . the courts, therefore, should presume that the legislature sought to act within constitutional limits"). It would be incongruous for the legislature to put into a statute a phrase from federal law that would make the statute unconstitutional.

Moreover, courts will construe state statutes identically with federal law only where the two sets of laws are in *pari materia*. *Underwater Construction*, 884 P.2d at 155. In *Underwater Construction*, the Alaska Supreme Court rejected the argument that it had to construe a state statute harmoniously with a federal statute just because they contained some of the same terms and concerned the same subject matter. *Id.* at 154-55 & n.18 ("[i]f the legislature wished to adopt or incorporate [federal law], it could have explicitly done so"). Where the state statute did not rely on the federal scheme, the Court found the two were not in *pari materia*, and therefore did not construe them identically. Here, the state statute concerns eligibility for a dividend, not standards for immigration. There is no evidence that the legislature intended to rely on the federal definition of the phrase "lawfully admitted for permanent residence in the United States," and no reason to construe AS 43.23.005(a)(5)(B) in *para materia* with 8 U.S.C. § 1101(a)(20).

A close reading of AS 43.23.005(a)(5) supports the conclusion that the legislature did not intend to incorporate federal law with regard to the definition of the phrase "lawfully admitted for permanent residence in the United States." Subsection (a)(5) of AS 43.23.005 contains four subparts, (A)-(D). Subparts, (B), (C), and (D) refer to alien eligibility for dividends. Subparts (C) and (D) both specifically incorporate federal law. *See* AS 43.23.005(a)(5)(C) ("an alien with refugee status under federal law") and 43.23.005(a)(5)(D) ("an alien that has been granted asylum under federal law"). Subpart (B), however, does not purport to incorporate federal law. *See* AS 43.23.005(a)(5)(B) ("an alien lawfully admitted for permanent residence in the United States"). The omission of the phrase "under federal law" from subpart (B) supports the inference that the legislature did not intend for this phrase to be construed under federal immigration law. *Cf., e.g., Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169-70 (Alaska 1991) ("when words used in a prior statute or

constitutional provision are omitted in a subsequent statute or provision, we presume that a change of meaning was intended").[8]

Even when first interpreting the new statute, the department recognized that AS 43.23.005(a)(5)(B) set a state law standard that was not equivalent to the federal definition of the phrase "lawfully admitted for permanent residence in the United States." Although the department adopted the federal definition in 15 AAC 23.153(a), the department then immediately departed from the federal definition by adopting 15 AAC 23.153(b), which allows aliens with conditional resident status to become eligible for dividends. Conditional residents do not meet the federal standard of 8 U.S.C. § 1101(a)(20). Thus, although the department's regulation project did not include an in-depth analysis of legislative intent, the department clearly recognized that interpretation of AS 43.23.005(a)(5)(B) was a matter of state law that was not limited to the confines of the federal definition of 8 U.S.C. § 1101(a)(20).

The Department of Revenue has broad authority to adopt regulations concerning eligibility for dividends. AS 43.23.015(a). The Alaska Supreme Court has already determined that this authority allows the department to put a "permissible gloss" on the eligibility requirements for aliens. *Cosio*, 858 P.2d at 624. In these circumstances, we conclude that the department is not locked into a construction of AS 43.23.005(a)(5)(B) that adopts the federal definition of "lawfully admitted for permanent residence in the United States." Accordingly, the department has the authority to repeal the portions of 15 AAC 23.153(a) and (c) that conflict with federal law, and to adopt a regulation that interprets AS 43.23.005(a)(5)(B) in a manner consistent with federal law.

In sum, the legislative history of AS 43.23.005(a)(5)(B), the canons of statutory construction, and the broad authority of the Department of Revenue all support the conclusion that the department of Revenue may adopt a construction of

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[8] Although AS 43.23.005(a)(5)(B) does not involve a subsequent omission of a phrase contained in a prior statute, word order does not appear to be crucial to the conclusion that the legislative omission signals a change of meaning. *See* 2B Norman J. Singer, *Sutherland Statutory Construction* § 51.02 at 122-23 (5th Ed. 1992) ("where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed"); *see also Elkins*, 435 U.S. at 666 (omission of phrase from some immigration classes regarding intent to return to homeland is pregnant with meaning).

AS 43.23.005(a)(5)(B) that brings Alaska law on eligibility for a dividend into conformance with federal immigration law. As explained below, we recommend that the department begin an emergency repeal of 15 AAC 23.153(a) and (c), and an emergency adoption of new regulations.

C. The department may issue emergency regulations that will bring the dividend program into compliance with federal law.

An agency may adopt emergency regulations when "necessary for the immediate preservation of the public peace, health, safety, or general welfare." AS 44.62.250. Emergency regulations avoid the delays inherent in the normal regulation adopting process, and would allow your staff to immediately issue dividends to those eligible Alaskans who would have already received dividends but for 15 AAC 23.153(a). Issuing emergency regulations also would inform the public of the state of the law and avoid confusion regarding dividend eligibility.

In order to issue emergency regulations, the Department of Revenue must make "a written finding, including a statement of the facts that constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health, safety, or general welfare." AS 44.62.250. The legislature has advised that "[i]t is the state policy that emergencies are held to a minimum and are rarely found to exist." AS 44.62.270.

The Department of Revenue has issued emergency regulations in the past to correct errors of law within the dividend program. For example, in 1996, the Department of Revenue found an emergency due to "the several statutory changes to the Permanent Fund Dividend program during the last legislative session and the later decision to revise fees charged for providing name and address lists to requestors." Finding of emergency, Dec. 17, 1996 (Dep't of Law Regulations File No. 993-97-0107). The facts constituting the emergency were "[t]he need to avoid public confusion in the coming dividend year created by inconsistencies between the current regulations and enacted statutory changes, and by Department of Revenue hearing decisions." Finding of Emergency, Nov. 19, 1996 (Dep't of Law Regulations File No. 993-97-0107).

Similarly, emergency regulations were prepared in 1982 regarding the permanent fund "back up bill." *See* 1982 Inf. Op. Att'y Gen. (Nov. 29; 366-284-83;). In a case that is somewhat on point, in 1984, this office advised that the Department of Administration adopt emergency regulations regarding allowable absences for the longevity bonus program. 1984 Inf. Op. Att'y Gen. (July 10; 366-617-84;).

In this case, in addition to the need to avoid confusion among the public, we have a regulation on the books that is in conflict with federal law. Litigation has been filed regarding this matter, and, in the course of this litigation, the Department of Law has informed the superior court that the Department of Revenue, if given an opportunity to address this situation, will take action to correct its own errors. *See* State's Motion for Extension of time, *Andrade v. State, Dep't of Revenue*, Case No. 3AN-98-3398 Civil.[9]

Furthermore, timing is important in correcting this error. The department may have pending applications for 1998 that it cannot pay because of this regulation. Indeed, if this matter is addressed through the normal regulation process, eligible Alaskans may not receive their 1999 dividend on time. The concern here is not for the administrative convenience of the department, but for the unfairness that these eligible Alaskans should be treated differently than other Alaskans. Moreover, the timing of the eligibility determination is important because it affects the amount of the dividend. In light of the facts and circumstances, and the past practice of the department regarding emergency regulations for the dividend program, we conclude that emergency regulations would be justified in this case.

CONCLUSION

Portions of the Department of Revenue's regulations on eligibility of nonimmigrant aliens for dividends, 15 AAC 23.153(a) and (c), are in conflict with federal law. This conflict arises because 15 AAC 23.153(a) precludes from eligibility for dividends certain aliens whose immigration status allows them to adopt the United States as their domicile. We advise that the department cease implementation of 15 AAC 23.153(a) to the extent that it prohibits a nonrestricted nonimmigrant from becoming eligible for a dividend.

We also conclude that the department could adopt a broader interpretation of the statute on dividend eligibility, AS 43.23.005(a)(5)(B), that would avoid a conflict with federal law by allowing a nonrestricted nonimmigrant alien to receive a dividend if the alien is otherwise qualified for a dividend. It would be appropriate for the department to adopt such a regulation on an emergency basis and then make the regulation permanent.

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[9] Promulgation of the emergency regulation will not obviate the litigation because other issues will remain before the court.