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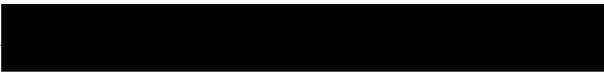
U.S. Citizenship
and Immigration
Services

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FILE:  Office: MIAMI DISTRICT OFFICE Date: **NOV 08 2004**

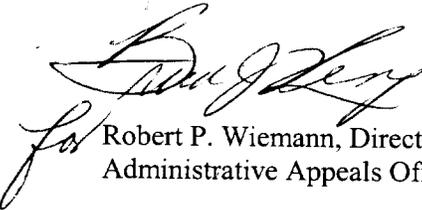
IN RE: Applicant: 

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:


INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Miami, Florida, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The district director determined that the applicant failed to establish that she has maintained continuous residence and continuous physical presence in the United States. The director, therefore, denied the application.

On appeal, counsel asserts that the application was incorrectly denied as the applicant was not given due consideration to the circumstances warranting the use of affidavits to prove her entry into the United States prior to December 30, 1998.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under § 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for TPS during the initial registration period announced by public notice in the *Federal Register*, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:
 - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;

- (iii) The applicant is a parolee or has a pending request for reparole; or
- (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of condition described in paragraph (f)(2) of this section.

The term *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations and since December 30, 1998. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

The term *continuously physically present*, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations and since January 5, 1999. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

The term *brief, casual, and innocent absence* as used in 8 C.F.R. § 244.1 means a departure from the United States that satisfies the following criteria:

- (1) Each such absence was of short duration and reasonably calculated to accomplish the purpose(s) for the absence;
- (2) The absence was not the result of an order of deportation, an order of voluntary departure, or an administrative grant of voluntary departure without the institution of deportation proceedings; and
- (3) The purposes for the absence from the United States or actions while outside of the United States were not contrary to law.

Persons applying for TPS offered to Hondurans must demonstrate that they have continuously resided in the United States since December 30, 1998, and that they have been continuously physically present since January 5, 1999. On May 11, 2000, the Attorney General announced an extension of the TPS designation until July 5, 2001. Subsequent extensions of the TPS designation have been granted with the latest extension valid until January 5, 2005, upon the applicant's re-registration during the requisite time period.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration

Services (CIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

The record shows that the applicant filed her TPS application on May 1, 1999. On February 3, 2000, the applicant was requested to submit evidence that she entered the United States prior to December 30, 1998, and has been continuously residing in the United States since that entry. The February 3, 2000 request listed examples of evidence the applicant could submit to establish eligibility for TPS. The district director reviewed and discussed the evidence furnished by the applicant in response to his request for additional evidence. That discussion will not be repeated here. The district director determined that the applicant furnished insufficient evidence and denied the application on December 10, 2003.

On appeal, counsel, on behalf of the applicant, states that the CIS incorrectly denied the application for TPS, by not giving due consideration to the circumstances warranting the alien's use of affidavits to prove her entry into the United States prior to December 30, 1998. Counsel also asserts the applicant's eligibility for TPS and states that she has been continuously physically present in the United States since the date of her arrival, except for a brief trip with an advance parole.

Further, counsel submits the following evidence on appeal: copies of the applicant's Honduran birth certificate with an English translation, and the biographical pages of her Honduran passport issued on December 10, 2003; a copy of a Notice of Action reflecting a receipt date of May 1, 1999 for the applicant's Employment Authorization; copies of the applicant's IRS Federal Income Tax Form 1040 and Form W-2, Wage and Tax Statements for the years 1999 to 2002; copies of utility bills dated January 14, 2000 to December 21, 2003; copies of money transfer receipts dated March 1, 1999 to June 5, 2003, copies of an injury report reflecting a date of employment of May 25, 1999 with the [REDACTED] in Boca Raton, Florida; copies of the applicant's test scores and school grade reports for the year 2003; a copy of a letter dated November 20, 2000 from [REDACTED] Senior Pastor, of the First Assembly of God Church; a copy of a monthly lease agreement dated October 1, 2001 with the [REDACTED] in Deerfield Beach, Florida; copies of medical bills dated September 4, 2003 to November 3, 2002; copies of correspondences from various businesses dated November 3, 1999 to January 19, 2002; copies of letters regarding her son's visa processing dated in 2002; copies of the applicant's medical insurance coverage for the year 2001; and copies of various appointments with the Miami District office in September and November 2003.

Counsel also provides affidavits from the applicant, her family members and acquaintances regarding the applicant's claimed entry into the United States and their contact with her. The statements provided by the affiants regarding the applicant's claimed presence in the United States prior to December 30, 1998, are not supported by corroborative evidence. It is reasonable to expect that the applicant would have some type of contemporaneous evidence to support these assertions. Affidavits from acquaintances are not, by themselves, persuasive evidence of residence or physical presence. Further, the applicant claims to have entered the United States on September 20, 1998; however, no corroborative evidence has been provided to cover the requisite time periods for Honduran TPS.

Further, the evidence provided by counsel on appeal does not cover the requisite time period of residence or physical presence in the United States for Honduran TPS. Although, counsel has provided documentary evidence regarding the applicant's continuous presence in the United States, the evidence post-dates the requisite time periods by five months. The earliest date from the submitted evidence is May 1, 1999 as reflected on the Notice of Action for the applicant's employment authorization. Moreover, the income tax documents may suggest that the applicant was in the United States during the year 1999; however, the burden is on the applicant to establish her continuous residence since December 30, 1998, and continuous physical presence since January 5, 1999.

The applicant has furnished insufficient evidence to establish that she has continuously resided in the United States since December 30, 1998, and has been continuously physically present from January 5, 1999 to the date she filed the application on May 1, 1999. Therefore, the applicant has failed to establish that she met the criteria for continuous residence and continuous physical presence described in 8 C.F.R. § 244.2(b) and (c). Consequently, the district director's decision to deny the application for TPS on these grounds will be affirmed.

Beyond the decision of the district director, the record of proceeding contains court records regarding the applicant's arrest on March 31, 2002, in Monroe County, Florida, and charged with domestic battery, in violation of Florida Statute 784.03. On May 1, 2002, the applicant was accepted to the Pre-Trial Intervention Program. She was required to complete 26 weeks of Domestic Safety Program, no harmful contact with the victim, and pay \$55 per month for Cost of Supervision. Upon successful completion of the pre-trial intervention program, a "nolle prossed" was entered on the case on January 28, 2003.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term "conviction:"

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where --

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

While the judge ordered some form of punishment, the applicant in this case was not found guilty of the charge, nor did she enter a plea of guilty or nolo contendere. Therefore, the applicant had not been convicted within the meaning of section 101(a)(48)(A) of the Act. Additionally, a pre-trial intervention or diversion does not involve a plea or a finding of guilt and, therefore, is not a conviction for immigration purposes. Furthermore, FS 784.03 is classified a misdemeanor. Therefore, the applicant is not ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on this one misdemeanor offense.

The burden of proof is upon the applicant to establish that she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden.



ORDER: The appeal is dismissed.