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U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date:

AUG 30 2005

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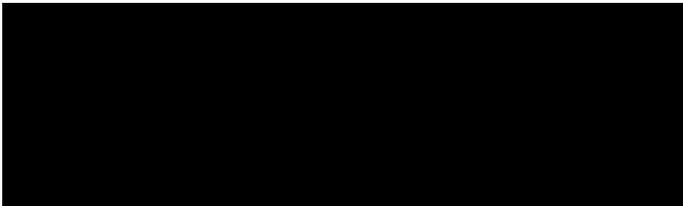
Applicant:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, 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 director denied the application because the applicant failed to establish she was eligible for late registration. The director also determined that the applicant had not established that she had been residing in the United States since December 30, 1998.

On appeal, counsel states that there “has been much confusion regarding the TPS registration of [REDACTED]”. Counsel asserts that the applicant, who is claiming both Honduran and El Salvadorian nationality, is filing for TPS as the spouse of an El Salvadorian TPS applicant. In support of the appeal, counsel provided copies of documentation previously submitted.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant 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 section 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 conditions described in paragraph (f)(2) of this section.

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 in the United States 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 July 5, 2006, upon the applicant's re-registration during the requisite time period.

The initial registration period for Hondurans was from January 5, 1999, through August 20, 1999. The record reflects that the applicant filed her initial TPS application with Citizenship and Immigration Services (CIS), on November 1, 2002.

The first issue raised by the director to be addressed in this proceeding is whether the applicant is eligible for late registration.

As stated in 8 C.F.R. § 244.1 "register" means "to properly file, with the director, a completed application with proper fee, for Temporary Protected Status during the registration period designated under section 244(b) of the Act."

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 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 of proceeding confirms that the applicant filed her application for TPS on November 1, 2002, after the initial registration period had closed. To qualify for late registration, the applicant must provide evidence that during the initial registration period, she was either in a valid immigration status, had an application pending for relief from removal, was a parolee, or was the spouse or child of an alien currently eligible to be a TPS registrant, and she had filed an application for late registration within 60 days of the expiration or termination of the conditions described in 8 C.F.R. § 244.2(f)(2).

In a notice of intent to deny, dated May 16, 2003, the applicant was requested to submit evidence establishing her eligibility for late registration as set forth in 8 C.F.R. § 244.2(f)(2). The applicant was also requested to submit evidence to demonstrate her continuous residence and her continuous physical presence in the United States during the requisite timeframes.

The director found that the applicant, in response to the notice of intent to deny, failed to establish that she was eligible for late registration. The director also determined that the applicant failed to establish her continuous residence in the United States since December 30, 1998. The director denied the application on September 2, 2003. It is noted that the director's decision did not cite the additional ground in the notice of intent to deny, which was the applicant's failure to establish her continuous physical presence in the United States during the requisite timeframe. This issue will be addressed beyond the decision of the director.

On appeal, counsel states that the applicant, on January 13, 2000, married [REDACTED] an El Salvadorian citizen by birth. Counsel also states that Mr. [REDACTED] first filed for TPS on May 24, 2001, under the TPS designated for El Salvadorian nationals, and his application was approved on August 22, 2003. Counsel further states, in pertinent part, that:

According to an agreement between the Honduran and Salvadoran governments, marriage between two nationals of the said countries does not require naturalization and denouncement of their citizenship of origin in order to obtain a second citizenship through their spouse.

The enclosed documents clearly establish that Mrs. [REDACTED] although a national and citizen of Honduras, is indeed a citizen of El Salvador through her marriage with [REDACTED]. The two have been married since January 2000 and have three United States citizen children, clearly establishing the legitimacy of their marriage.

The July 11, 2002 Federal Register (Vol. 67, No. 133) announces the granting TPS Extension for Salvadorans. Page 46002 of the Register clearly explains the eligibility for certain persons to apply for late initial registration under 8 CFR 244.2(f). Mrs. [REDACTED] qualifies for late initial registration pursuant to subsection (iv) of this section as the spouse of an alien currently eligible to be a TPS registrant.

Additionally, in the spirit of the extension of the TPS program for nationals of El Salvador, for humanitarian reasons, its reopening is also respectfully requested.

The Board of Immigration Appeals, in *Matter of Ognibene*, 18 I&N Dec. 425 (BIA 1983), concluded that although an alien may hold the phenomenon of dual nationality, an alien may only claim one citizenship at a time for purposes of immigration matters within the United States. As explained in *Ognibene*, clearly, it is not the prerogative or position of the United States to require a dual national alien nonimmigrant to elect to retain one or another of his nationalities. Equally as clear, the national sovereignty of the United States is acceptably and reasonably exercised through section 214 of the Act in holding that a dual national alien nonimmigrant is, for the duration of his temporary stay in the United States, of the nationality which he claimed or established at the time that he entered the United States.

The Board, in *Ognibene*, further held that under appropriate circumstances in a given proceeding of law, the operative nationality of a dual national may be determined by his conduct without affording him the opportunity to elect which of his nationalities he will exercise. The General Counsel, in GENCO Op. 84-22 (July 13, 1984), reinforced this concept and states, "In interpreting a law which turns on nationality, the individual's conduct with regard to a particular nation may be examined. An individual's conduct determines his 'operative nationality.' The 'operative nationality' is determined by allowing the individual to elect which nationality to exercise. The nationality claimed or established by the nonimmigrant alien when he enters the United States must be regarded as his sole nationality for the duration of his stay in the United States." [Emphasis in original].

In *Chevron USA, Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 842-843 & n.9 (1984), the district court held that the practice of binding an alien to his claimed nationality "promotes the congressional policy of insuring that an alien will be able to return, voluntarily or otherwise, to his or her country of origin if requested to do so and provides for consistency in the enforcement of law, especially given the large numbers of nonimmigrant foreign nationals who visit the United States each year."

While the applicant, in this case, entered the United States without inspection, the applicant claimed to be a national and citizen of Honduras throughout these immigration proceedings. The nationality the applicant claimed and/or established at the time she first came into contact with the Service (now CIS) was that of a Honduran. On subsequent filings before CIS, including a second TPS application filed on November 14, 2003, the applicant continued to present herself as Honduran. Therefore, this citizenship must be regarded as her operative nationality during these proceedings. It is noted that the second TPS application, filed on November 14, 2003, was denied by the director on February 11, 2004.

The applicant has provided no documentary evidence on appeal to establish that she is a Honduran TPS applicant who at the time of the initial filing (January 5, 1999 through August 20, 1999) was either in a valid immigration status, had an application pending for relief from removal, was a parolee, or was the spouse or child of an alien currently eligible to be a TPS registrant, and that she had filed an application for late registration within 60 days of the expiration or termination of the conditions described in 8 C.F.R. § 244.2(f)(2). Therefore, the applicant does not qualify for late registration. It must be noted that the applicant can not be considered as a spouse of an alien currently eligible to be a TPS registrant at the time of the initial registration period of January 5, 1999, through August 20, 1999, as the applicant was not married until January 13, 2000, almost five months after the initial registration period had ended. Consequently, the director's decision to deny the application for temporary protected status will be affirmed. There is no other humanitarian benefit under the provisions of TPS.

The remaining issue raised by the director to be addressed in this proceeding is whether the applicant has been continuously residing in the United States since December 30, 1998.

The phrase 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. 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 phrase 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. 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 phrase brief, casual, and innocent absence, as defined 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.

The director found that the applicant, in her response to the above-mentioned notice of intent to deny, failed to establish that she had been continuously residing in the United States since December 30, 1998. The director denied the application on September 2, 2003.

On appeal, counsel contends that the documentation being submitted on appeal, such as "a Honduran Passport issued in New York on March 20, 2002, a Marriage Certificate dated January 19, 2000, EAC of [REDACTED] TPS Approval Notice of [REDACTED] Birth Certificate of [REDACTED] applicant's daughter), and a Birth Certificate of [REDACTED] clearly establishes the applicant's TPS eligibility.

None of the aforementioned documentation presented by counsel on appeal is sufficient in demonstrating the applicant's continuous residence in the United States during the requisite timeframe. Counsel has provided no documentary evidence on appeal that demonstrates the applicant's day-to-day living in the United States since December 30, 1998. The documentation provided on appeal is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The applicant has failed to provide sufficient evidence to establish that she has met the criteria described in 8 C.F.R. § 244.2(c). Consequently, the director's decision to deny the application for TPS on this ground will be affirmed.

Beyond the decision of the director, for the reasons stated above, the applicant has also failed to provide sufficient evidence to demonstrate her continuous physical presence in the United States since January 5, 1999. Therefore, the application must also be denied for this reason.

An alien applying for temporary protected status has the burden of proving that he or 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.