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U.S. Citizenship
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Services

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FILE:



[SRC 00 236 54892]

Office: TEXAS SERVICE CENTER

Date: JUN 13 2005

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:

Self-represented

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, reopened, and denied again by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be a native and citizen of Nicaragua 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 had failed to establish that: (1) he was an eligible national of Nicaragua; (2) he was eligible for late registration; and (3) he was not convicted of a felony or two misdemeanors.

On appeal, the applicant asserts that he is eligible as a child of Nicaraguans, and that he is also a Nicaraguan citizen. He submits additional evidence, including court documents regarding his felony offenses.

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. 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. 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.

Persons applying for TPS offered to Nicaraguans 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 July 5, 2006, upon the applicant's re-registration during the requisite time period.

The first issue in this proceeding is whether the applicant is a national of Nicaragua.

The record of proceeding contains a delayed foreign-born certificate issued in Nicaragua on June 26, 2000, and the applicant's birth certificate issued in Venezuela, both indicating that the applicant was born in Venezuela on March 4, 1980, to a Nicaraguan mother and Nicaraguan father. On July 26, 1995, and again on February 8, 1997, the applicant was admitted into the United States as a B-2 nonimmigrant visitor with a Venezuelan passport containing a U.S. visa issued in Caracas, Venezuela, on June 12, 1995, and indicating that his country of citizen and country of residence are that of Venezuela.

The United States Court of Appeals, in *Chee Kin Jang v. Reno*, 113 F. 3d 1074 (9th Cir. 1997), found that the Service reasonably interpreted the term "PRC national" in CSPA (Chinese Student Protection Act) to exclude Chinese dual nationals who did not declare citizenship of PRC (People's Republic of China) when they entered the United States, and that the Service's different treatment of PRC dual nationals, depending on whether they entered under PRC passport or passport of different country, was reasonable. The Court states that an alien is bound by the nationality claimed or established at the time of entry for the duration of his or her stay in the United States. Thus, a dual national CSPA principal applicant must have claimed PRC nationality at the time of his or her last entry into the United States.

In *Chevron USA, Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 842-43 & 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."

Additionally, the Board of Immigration Appeals, in *Matter of Ognibene*, 18 I&N Dec. 425 (BIA 1983), 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 entered the United States must be regarded as his sole nationality for the duration of his stay in the United States." (Emphasis in original).

Further, the General Counsel, in GENCO Op. 92-34 (August 7, 1992), concluded that the Service may, in the exercise of discretion, deny TPS in the case of an alien who, although a national of a foreign state designated for TPS, is also a national of another foreign state that has not been designated for TPS. The General Counsel explains that "TPS is not a provision designated to create a general right to remain in the United States. Rather, the statute provides a regularized means of granting haven to aliens who, because of extraordinary and temporary circumstances, cannot return to their home country in safety. See *id.* 244A(b)(1)(A), (B), and (C), 8 U.S.C. § 1254A(b)(1)(A), (B), and (C)."

The nationality the applicant claimed and/or established at the time he first came into contact with Department of Homeland Security (DHS) was that of Venezuela. The record is clear in establishing that the applicant elected to present himself as a national of Venezuela to the United States government when he applied for his U.S. visa and at the time of his initial and subsequent entries into the United States.

The country of Venezuela is not a designated foreign state under section 244 of the Act. The applicant, therefore, does not meet the eligibility requirements of being a national of a state designated under section 244(b) of the Act. Accordingly, as the applicant has not demonstrated that his "operative nationality" is that of a TPS-designated country, the director's decision to deny the application for this reason will be affirmed, as a matter of discretion.

The second issue in this proceeding is whether the applicant was eligible for late registration.

The initial registration period for Nicaraguans was from January 5, 1999 through August 20, 1999. The record shows that the applicant filed his TPS application on July 5, 2000.

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 last entered the United States as a B-2 nonimmigrant visitor on February 8, 1997, and was authorized to remain in the United States until August 7, 1997.

In order to qualify for late registration, the applicant must provide evidence that, at the time of the initial registration period of January 5, 1999 through August 20, 1999, he met one of the criteria described in 8 C.F.R. § 244.2(f)(2) (listed above). If the qualifying condition or application has expired or been terminated, the individual must file within a 60-day period immediately following the expiration or termination of the qualifying condition in order to be considered for late initial registration. See 8 C.F.R. 244.2(3)(g). In this case, the

applicant's nonimmigrant status expired on August 7, 1997, approximately 18 months prior to the initial registration period. Therefore, he does not meet this portion of the required criteria.

The applicant, however, provided evidence that his Nicaraguan mother was granted TPS on April 3, 2000. Therefore, the applicant has met the criteria for late registration as the child of an alien currently eligible for TPS, as described in 8 C.F.R. § 244.2(f)(2)(iv). Accordingly, the director's decision to deny the application for this reason will be withdrawn.

The third issue in this proceeding is whether the applicant had been convicted of a felony or two or more misdemeanors.

An alien shall not be eligible for temporary protected status under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

Felony means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

Misdemeanor means a crime committed in the United States, either

- (1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
- (2) A crime treated as a misdemeanor under the term "felony" of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

The record shows that on November 4, 1998, in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, Case No. [REDACTED] (arrest date October 14, 1998), the applicant was indicted for Count 1, burglary of an unoccupied dwelling, Florida Statute 810.02(3), a felony; and count 2, grand theft, Florida Statute 812.014(2)(c)(3), a felony. On November 4, 1998, Case No. [REDACTED] was transferred to Case No. [REDACTED] and on November 16, 1998, Case No. [REDACTED] was closed. The applicant was placed in a Pretrial Diversion Program, and on August 19, 1999, the court ordered a "nolle pros" on the case based on completion of the pretrial diversion. Diversion, in this case, is not a conviction for immigration purposes. The applicant successfully completed diversion, and the case was dismissed.

The applicant was not convicted of the criminal offenses listed above. Therefore, he is not ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act. The director's decision to deny the application for this reason will also be withdrawn.

However, the applicant remains ineligible for TPS because he has failed to establish that he was eligible for TPS based on his nationality, pursuant to section 244(b) of the Act, and because he has failed to establish that he has met any of the criteria for late registration described in 8 C.F.R. § 244.2(f)(2). Consequently, the director's decision to deny the application will be affirmed.

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.