

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



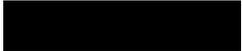
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

M1



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAY 10 2005

[WAC 01 172 50342]

IN RE:

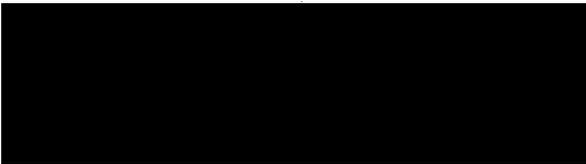
Applicant:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant claims to be a native and citizen of El Salvador 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 had been continuously physically present in the United States since March 9, 2001.

On appeal, counsel for the applicant submits a brief and resubmits photocopies of documents already contained in the record of proceeding.

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 is eligible for temporary protected status only if such alien establishes that he or she:

- (a) is a national of a 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 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, or
 - (2) registers for TPS during any subsequent extension of such designation, if the applicant meets the above listed requirements and:
 - (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.

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.

On March 9, 2001, the Attorney General designated El Salvador for TPS. On July 9, 2002, the Attorney General announced an extension of the TPS designation until September 9, 2003. The Secretary of the Department of Homeland Security granted a subsequent extension of that designation, with validity until March 9, 2005, upon the applicant's re-registration during the requisite time period.

Persons applying for TPS offered to El Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The initial registration period for Salvadorans was from March 9, 2001, through September 9, 2002.

The burden of proof is upon the applicant to establish that 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 her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from her own statements. 8 C.F.R. § 244.9(b).

The applicant filed her initial Form I-821, Application for Temporary Protected Status, on March 26, 2001, within the initial registration period. The applicant indicated on her Form I-821 that: she was born in Canton El Shiste, El Salvador, on January 26, 1978; is a citizen of El Salvador; had last entered the United States without inspection in Arizona on November 23, 2000; and, was presently in deportation proceedings.

On February 3, 2003, the applicant was requested to submit evidence to establish her continuous residence and continuous physical presence in the United States during the requisite time periods. In response, the applicant submitted documentation referencing her deportation proceedings, instituted on November 23, 2000. She also submitted documentation to establish her physical presence in the United States from on or about May 14, 2002 until on or about February 22, 2003.

The director determined that the evidence submitted by the applicant was insufficient to establish that she had been continuously physically present in the United States from March 9, 2001 through to the date of filing her TPS application. The director denied the application on July 14, 2003.

A review of the record reflects that United States Border Patrol authorities initially apprehended the applicant entering the United States from Mexico without inspection on November 21, 2000. At that time, the applicant stated that she was a citizen of Mexico. She requested, and was granted, voluntary return to Mexico. Mexican authorities, however, determined that the applicant was not a Mexican citizen and returned her to the custody of U.S. Border Patrol authorities the next day, on November 22, 2000. The applicant then stated to U.S. authorities that she was a native and citizen of Guatemala, had last resided in Guatemala, and that her mother was born in Guatemala, her father in El Salvador. The applicant was detained and placed in deportation proceedings as a native and citizen of Guatemala.

On December 13, 2000, the applicant was released from custody on a \$5,000 bond. The obligor of the bond was Irma Sandoval of Reseda, California. The applicant was also granted a request for a change of venue of her removal proceedings from the Immigration Court in Florence, Arizona, to the Immigration Court in Los Angeles, California.

On March 1, 2001, the Immigration Court in Los Angeles, California, rescheduled the applicant's removal hearing to take place on June 12, 2001. On March 26, 2001, as previously indicated, the applicant filed her initial TPS application claiming to be a native and citizen of El Salvador. On June 1, 2001, the applicant obtained a Salvadoran passport from Salvadoran authorities in Los Angeles, California. On May 31, 2002, the applicant orally amended her place of birth and country of citizenship to reflect El Salvador, rather than Guatemala, and her removal proceedings were administratively closed.

On appeal, counsel asserts that it is inconceivable that the applicant was not continuously physically present in the United States during the brief period from March 9, 2001, to the date of filing her TPS application, because she was in removal proceedings. Counsel further asserts that if the Immigration Court had believed that the applicant had departed the United States, it should have opposed the administrative closure of her removal proceedings. Counsel claims that, at this junction, the government is estopped from making the argument that the applicant departed, as to do so is a violation of her right to due process.

The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted through regulations at 8 C.F.R. § 103.1(f)(3)(iii). Accordingly, the AAO has no authority to address counsel's estoppel claim.

The applicant claims to have been continuously physically present in the United States since November 22, 2000. On February 23, 2003, she was requested to submit evidence to support that claim. Specifically, the director advised the applicant that acceptable evidence of her continuous physical presence might include employment records, rent/mortgage payment receipts, medical or utility bills, or similar materials. In response, she submitted documentation dating from about May 14, 2002 until on or about February 22, 2003. She submitted no evidence, other than documentation regarding her removal proceedings, to show that she had been continuously physically present in the United States from March 9, 2001 until May 14, 2002.

It is determined that the documentation submitted by the applicant is insufficient to establish that she satisfies the continuous physical presence requirements described in 8 C.F.R. § 244.2(b). Consequently, the director's decision to deny the application for temporary protected status will be affirmed.

Beyond the decision of the director, the applicant has not established that she is a national of a designated TPS country.

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

Is a national of a foreign state designated under section 244(b) of the Act;....

In *Chee Kin Jang v. Reno*, 113 F. 3d 1074 (9th Cir. 1997), the United States Court of Appeals stated 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. 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."

Additionally, 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).

Additionally, the General Counsel, in GENCO Op. 92-34 (August 7, 1992), concluded that CIS 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. § 1254(b)(1)(a), (b), and (c)."

In this case, the nationality the applicant claimed at the time she was placed in removal proceedings was that of Guatemala. Guatemala is not a designated foreign state under Section 244 of the Act. It was not until after the Attorney General had designated El Salvador for TPS that the applicant claimed to be a national of El Salvador.

Even if the applicant is a national of El Salvador, or a dual-national of El Salvador and Guatemala, it is further noted that she claimed to have been living in Guatemala prior to her entry into the United States. An alien shall not be eligible for temporary protected status if the Attorney General finds that the alien was firmly resettled in another country prior to arriving in the United States. Sections 244(c)(2)(B)(ii) and 208(b)(2)(A)(vi) of the Immigration and Nationality Act (the Act).

As defined in 8 C.F.R. § 208.15, an alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

- (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or
- (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to

hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

In this case, it appears that the applicant was firmly settled in Guatemala prior to her entry into the United States. Therefore, the application must also be denied for this reason.

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