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U.S. Citizenship
and Immigration
Services



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FILE:



Office: BLOOMINGTON, MINNESOTA

Date: NOV 02 2008

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The applicant was born in Kenya and is stated to be a citizen of Somalia. The applicant is seeking Temporary Protected Status (TPS), as a national of Somalia, 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 he was eligible for late registration.

On appeal, counsel contends that although the applicant is “out of status,” he is still a nonimmigrant and is eligible, as a citizen of Somalia, to apply for TPS as a late initial registrant.

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.

The 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 initial registration period for TPS for Somalia was from September 4, 2001 to September 17, 2002. A subsequent extension of the TPS designation has been granted by the Secretary of the Department of Homeland Security, with validity until September 15, 2005, upon the applicant’s re-registration during the requisite time period. The record reflects that the applicant filed his initial application with Citizenship and Immigration Services (CIS), on September 19, 2003.

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 own statements. 8 C.F.R. § 244.9(b).

The record of proceeding confirms that the applicant filed an application for TPS for nationals of Somalia on September 19, 2003, after the initial TPS registration period for Somalia had closed. To qualify for late registration, the applicant must provide evidence that during the initial registration period, he 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 he 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).

The applicant first entered the United States on September 29, 1995, as an F-1 student. The record indicates that the applicant graduated from school in the winter of 2002. Subsequent to graduation, the applicant enrolled in an optional practical training program, which expired on May 15, 2003. The record also indicates that the applicant maintained his non-immigrant student status until May 15, 2003.

On appeal, counsel contends, in pertinent part, that:

Ahmed Osman remains a nonimmigrant notwithstanding that his student status ended on May 15, 2003. And because he is still a nonimmigrant (even though out of status) he can apply for late initial registration for TPS as he:

1. Is a citizen of Somalia;
2. Has been continuously physically present in the United States since September 29, 1995;
3. Is admissible as an immigrant; and,
4. Did not register for TPS during the registration period for TPS for Somali citizens i.e. from September 4, 2001, through September 17, 2002, by reason of the fact that he was then in current student status.

Ahmed Osman applied for late initial registration for TPS on September 18, 2003, during the last registration period for TPS for nationals of Somalia. He did so while a nonimmigrant and is not affected by the 60-day rule which the Service wrongly computed from May 15, 2003, when his student status ended, but not his status as a nonimmigrant.

For TPS purposes, the applicant was required to file his Form I-821, Application for Temporary Protected Status, within 60 days of the termination of his nonimmigrant student status on May 15, 2003, in order to be eligible for late registration under the provisions of 8 C.F.R. § 244.2(f)(2). As previously stated, the applicant did not file his TPS application until September 19, 2003, almost two months after the 60-day period had passed. Therefore, the applicant is not eligible for late initial registration as an alien who was a nonimmigrant during the initial registration period, and who filed his TPS application within 60 days of the termination of that condition. Consequently, the director's decision to deny the applicant's application for temporary protected status as a citizen of Somalia will be affirmed.

Beyond the decision of the director, the applicant has not established that he is eligible to file for TPS as a national of Somalia.

The applicant stated on his TPS and employment authorization applications that he was born in Kenya, and that he is a citizen of Somalia. The record contains: a copy of the applicant's passport which shows his nationality as Kenyan, and includes a U.S. visa also showing the applicant's nationality as Kenyan; a copy of the applicant's birth certificate, which shows that he was born on January 20, 1960 in Wajir, Kenya; copies of the applicant's Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) student Status – For Academic and Language Students, showing the applicant's country of birth as Kenya, and his country of citizenship as Kenya; and, a copy of the applicant's Form I-94, Departure Record, on which the applicant lists his country of citizenship as Kenya.

The Board, in *Ognibene*, 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.”

The applicant, upon entry into the United States on September 29, 1995, claimed to be a national of Kenya. Although the applicant states on his TPS and employment authorization applications that he is a citizen of Somalia, the record contains no documentary evidence to establish such. From the applicant’s initial entry into the United States in September of 1995 and up to the date of filing of his TPS and employment authorization applications, the applicant claimed and/or established that he was a national of Kenya. The applicant’s only claim to Somalia citizenship was when he listed it on his TPS and employment authorization applications filed on September 19, 2003. As the record contains no documentary evidence to establish that the applicant is a national of Somalia, the applicant’s nationality must be regarded as Kenyan. Consequently, the applicant is not eligible to file for TPS as a national of Somalia. Therefore, the application must also be denied for this reason.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.