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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



MM

FILE:



OFFICE: CALIFORNIA SERVICE CENTER

DATE: 03/04/05

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: An appeal is pending before the Administrative Appeals Office (AAO). The case will be remanded to the California Service Center director for further action.

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.

Counsel states that he is appealing a decision of the director dated July 23, 2005. That decision, however, is not contained in the record of proceeding.

A chronology of the applicant's case, as evidenced by the record presented to the AAO, is as follows:

1. The record shows that the applicant entered the United States with a B-1 nonimmigrant visitor's visa on July 21, 1998, and was authorized to remain until January 20, 1999.

2. The applicant filed a TPS application on August 16, 1999, during the initial registration period for Hondurans from January 5, 1999 through August 20, 1999 [LIN-99 235 51190]. That application was denied on February 14, 2000, based on abandonment, because the applicant failed to respond to the director's September 3, 1999, request for additional evidence establishing his continuous physical presence in the United States since January 5, 1999.

3. A Form I-862, Notice to Appear, was issued in Detroit, Michigan, on June 19, 2000, based on the applicant's entry into the United States "without inspection" on or about July 21, 1998. On August 6, 2001, the applicant's attorney stated that a mistake had been made because the applicant did not enter the United States illegally. He further stated that the applicant was arrested based on a misdemeanor complaint filed on July 7, 1999, but that the case was subsequently dismissed on February 16, 2000. While the attorney stated that the misdemeanor complaint is attached as Exhibit A, this complaint is not contained in the record. However, the Federal Bureau of Investigation fingerprint results report, contained in the record of proceeding, shows that on July 28, 1999, in Ann Arbor, Michigan, the applicant was arrested for "RETAIL FRAUD III." The final court disposition of this arrest is not contained in the record, nor is there evidence that the applicant was requested to submit arrest reports and final court dispositions of all of his arrests.

4. On August 21, 2001, the director rejected a TPS application filed by the applicant because the application "was filed after the August 6, 2001, deadline."

5. On September 16, 2001, the applicant's attorney responded by asserting that he called the Telephone Center and was told by an unidentified agent that an August 6, 2001 postmark would make the filing timely. He stated that he later spoke to a supervisor, and based on the supervisor's suggestion, he resubmitted the application; however, he had not received a response.

6. On June 28, 2002, the applicant filed Form I-821, Application for Temporary Protected Status [LIN-02-232-50494].

7. On September 27, 2002, the applicant was requested to submit: (1) evidence to establish that he was eligible for late initial registration; (2) a copy of his birth certificate or passport; (3) evidence to show continuous residence in the United States since December 30, 1998; and (4) evidence to show continuous physical presence since January 5, 1999.

8. In a notice of decision issued on January 23, 2003 [LIN-02-232-50494, No. 6 above], the director noted that, based on the applicant's response to his request, the applicant had met the requirements for identity, date of entry, residence, and physical presence, but that the applicant had failed to provide conclusive evidence of his nationality and evidence that he qualified for late initial registration. The director denied the application accordingly.

9. On February 21, 2003, the applicant filed a motion to reopen. The director granted the motion. However, after a complete review of the record of proceeding, including the motion, the director determined that the applicant had not overcome grounds of denial in that the applicant had failed to provide conclusive evidence that he met the qualification for late initial registration. The director affirmed his previous decision and denied the application on April 2, 2003.

10. On May 5, 2003, the applicant filed Form I-290B, Notice of Appeal to the Commissioner, in which he appealed the director's April 2, 2003 decision to deny the TPS application filed on June 28, 2002. The director maintained that after a complete review of the record of proceedings, including the appeal and its supporting documentation, the grounds for denial had been overcome. The director treated the appeal as a Motion to Reopen, and on June 4, 2003, ordered that the application be approved.

11. On September 18, 2003, a Form I-261, Additional Charges of Inadmissibility/Deportability, was issued based on the applicant's admission to the United States as a nonimmigrant visitor on July 21, 1998, and remaining in the United States for a time longer than permitted [beyond January 20, 1999], without authorization. The charge under section 212(a)(6)(A)(i) of the Act, entry without inspection, was withdrawn.

12. On September 19, 2003, the Immigration Judge, Detroit, Michigan, administratively closed the removal proceedings, stating "alien has TPS."

13. On July 12, 2005, the Form I-130, Petition for Alien Relative [LIN-03-211-51515], filed on behalf of the applicant by his United States citizen wife, was approved (with "204g of the Act Considered"), and was assigned a priority date of June 30, 2003.

14. On August 19, 2005, counsel filed Form I-290B indicating that the director had issued a July 23, 2005, denial.¹

On appeal, counsel quotes, in part, the director's decision: "USCIS records show that the applicant's prior Form I-821 was denied, because the applicant did not establish prima facie eligibility. Since temporary protected status has not been granted, the applicant is ineligible for re-registration under 8 C.F.R. 244.7(a). Therefore, the application is denied."² Counsel asserts that this finding of the director is "absolutely incorrect" because the applicant's TPS had been approved. To support his claim, he submits a copy of the June 4, 2003 decision (No. 10 above).

The record of proceeding does not contain all of the pertinent documents relating to the applicant, including the Form I-821 and the director's decision to deny referenced by the attorney as dated on July 23, 2005, that is presently under appeal. As noted in No. 10 above, the applicant's TPS application had since been approved on

¹ This decision is not contained in the record of proceeding.

² This Form I-821 is not contained in the record of proceeding.

June 4, 2003. Therefore, the case will be remanded. The director shall review all relevant records of proceeding, and any other files that may relate to the applicant, including those from both the California and the Nebraska Service Centers.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The case is remanded to the director for further consideration and action.