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FILE:

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[EAC 03 237 52540]

Office: VERMONT SERVICE CENTER

Date: JUN 28 2006

IN RE:

Applicant:

[REDACTED]

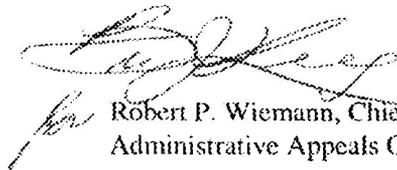
APPLICATION:

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.

  
for Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The applicant is stated to be 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 he was eligible for late registration. The director also determined that the applicant failed to establish his continuous residence and his continuous physical presence in the United States during the requisite timeframes. The director further determined that the applicant failed to establish his identity. The director states:

The record contains information indicating that you were apprehended while attempting to enter the U.S. illegally on August 29, 2001. It should be noted that at the time of your apprehension, your sworn statement includes the assertion that you are a citizen of Mexico. There is no explanation in the file about this discrepancy.

On appeal, the applicant provides a brief statement.

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 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 initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. The record reflects that the applicant filed his application on August 16, 2003. It is also noted that the applicant filed a subsequent TPS application on February 7, 2005.

To qualify for late registration, the applicant must provide evidence that during the initial registration period, he or 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 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 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).

In a notice of intent to deny, dated August 30, 2004, the applicant was requested to submit evidence establishing his eligibility for late registration as set forth in 8 C.F.R. § 244.2(f)(2). The applicant was also requested to submit evidence establishing his continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. In addition, the applicant was requested to submit evidence of his nationality. Further, the applicant was requested to submit evidence to show that his time outside the United States (Deported on August 30, 2001) was brief, casual and innocent. The applicant failed to respond to the notice of intent to deny.

The director determined that the applicant did not provide any documentation to address his eligibility for late registration. The director also determined that the applicant failed to establish his continuous residence and his continuous physical presence during the requisite timeframes. The director further determined that the discrepancy regarding the applicant's nationality had not been explained. The director denied the application on March 21, 2005. The applicant was given 30 days to file an appeal (33 days if the notice was received by mail).

The applicant filed an appeal on April 8, 2005.

On appeal, the applicant states that he submitted evidence of his continuous physical presence in the U.S. since August of 2001.

The applicant has provided no documentary evidence on appeal to establish that he has met any of the criteria for late registration as described in 8 C.F.R. § 244.2(f)(2). Consequently, the director's decision to deny the application for temporary protected status for this reason will be affirmed.

The second issue in this proceeding is whether the applicant has established his nationality.

On appeal, the applicant states "I am a Salvadorian national who entered U.S. via Mexico and meant to say that I was residing in Mexico in route to U.S. when apprehended [sic]."

The record shows that the applicant, in a Jurat Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867A), dated August 30, 2001, stated that he was born in "Naranjo, Guerrero, Mexico," and that he is a citizen of Mexico. The applicant also stated that both his mother and father are citizens of Mexico.

The record contains a copy of an El Salvadorian passport and birth certificate bearing the applicant's name, both showing his date of birth as July 6, 1981 and [REDACTED]. However, the authenticity of the documentation is in question, as the applicant claims to be a Mexican national

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 Mexico throughout these immigration proceedings. The nationality the applicant claimed and/or established at the time he first came into contact with the Service (now CIS) was that of a Mexican. Therefore, this citizenship must be regarded as his operative nationality during these proceedings.

Consequently, the applicant is ineligible to file for TPS.

The remaining issues raised by the director to be addressed in this proceeding are whether the applicant has continuously resided in the United States since February 13, 2001, and whether he has been continuously physically present in the United States since March 9, 2001.

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.

Persons applying for TPS offered to El Salvadorans must demonstrate entry on or prior to February 13, 2001, that they have continuously resided in the United States since February 13, 2001, and that they have been continuously physically present in the United States since March 9, 2001. On July 9, 2002, the Attorney General announced an extension of the TPS designation until September 9, 2003. Subsequent extensions of the TPS designation have been granted, with the latest extension valid until September 9, 2006, upon the applicant's re-registration during the requisite time period.

As previously stated in the above mentioned notice of intent to deny, dated August 30, 2004, the applicant was requested to submit evidence establishing his continuous physical presence in the United States since March 9, 2001, and his continuous residence in the United States since February 13, 2001.

The director determined that the applicant failed to submit evidence to establish his continuous residence and his continuous physical presence in the United States during the requisite timeframes and denied the application on March 21, 2005.

On appeal, the applicant states that he previously submitted evidence of his continuous residence in the United States since August of 2001. Despite the applicant's claim, the record contains no documentary evidence to establish the applicant's continuous residence and continuous physical presence in the United States during the requisite timeframes. In addition, as the applicant did not enter the United States until August 25, 2001, it is impossible for the applicant to present documentation of continuous residence and continuous physical presence in the United States from February 13, 2001, to the date of his entry into the U.S. on August 25, 2001.

The record contains no documentary evidence to establish that the applicant has been continuously residing in the United States since February 13, 2001, and has been continuously physically present in the United States since March 9, 2001. The applicant has not met the continuous residence and continuous physical presence criteria described in 8 C.F.R. § 244.2 (b) and (c). Consequently, the director's decision to deny the application for temporary protected status for these reasons will also be affirmed.

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.