



U.S. Citizenship
and Immigration
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: JUN 20 2007

[WAC 01 166 51034]

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.

Cindy M. Gomez for

Robert P. Wiemann, Chief
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 matter will be remanded for further consideration and action.

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 record reveals that the applicant was apprehended by officers of the United States Immigration and Naturalization Service, now United States Customs and Border Protection (CBP), on October 3, 1999, and charged with attempted illegal entry into the United States from Mexico in violation of 8 U.S.C. § 1325, and attempting to enter the United States using a counterfeit ADIT (immigrant visa processing) stamp in violation of 18 U.S.C. § 1546(a).

The director noted that the applicant is inadmissible to the United States under section 212(a)(6)(C) of the Act and denied the application on October 27, 2004, because the applicant had not filed a Form I-601, Application for Waiver of Grounds of Excludability. The director stated, “[t]he applicant may submit a Form I-601, Application for Waiver of Grounds of Excludability with fee (\$170.00), if the applicant believes he or she is eligible for such waiver.”

On appeal, counsel for the applicant states that the applicant has submitted a Form I-601 and requests that the waiver application be approved and the applicant be granted TPS. Counsel states that the applicant is the sole provider for his wife and his two United States citizen children, and his family would suffer extreme hardship if the applicant were to be removed to El Salvador. Counsel submits a statement from the applicant and a statement from the applicant’s wife, [REDACTED]. The Form I-601 was filed on December 10, 2004; the appeal on November 24, 2004.

Pursuant to 8 C.F.R. § 244.3(b), CIS may waive inadmissibility under the provisions of section 212(a) of the Act in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is inadmissible on grounds that may be waived, he or she shall be advised of the procedures for applying for a waiver of grounds of inadmissibility on Form I-601, Application for Waiver of Grounds of Excludability.

In this case, the director denied the application without issuing a notice advising the applicant of the procedure for applying for a waiver of grounds of inadmissibility on a Form I-601 waiver application as required.

Concurrently with the applicant’s appeal from the denial decision, counsel for the applicant has now filed a Form I-601. The director shall adjudicate the Form I-601 and shall fully adjudicate the Form I-821.

Accordingly, the matter is remanded for action consistent with the foregoing. The director may request any evidence deemed necessary to assist with the determination of the applicant’s eligibility for TPS.

It is noted that the applicant’s removal record [REDACTED] reveals that the applicant stated in a sworn statement before United States Border Patrol officers on October 4, 1999, that his name was [REDACTED], and that he was born in Durango, Mexico, on November 6, 1970. The applicant

further stated that he was a citizen of Mexico and both of his parents were citizens of Mexico. The applicant now claims to be a citizen of El Salvador on his Form I-821, Application for Temporary Protected Status, and now lists his birth date as April 15, 1975.

In *Chee Kin Jang v. Reno*, 113 F. 3d 1074 (9th Cir. 1997), the United States Court of Appeals 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 treatment of PRC dual nationals, depending on whether they entered under a PRC passport or a passport of a 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, 842-843 & 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 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. § 1254(b)(1)(a), (b), and (c).”

In this case, the applicant claimed to be a citizen of Mexico when he was apprehended and expeditiously removed from the United States in 1999. The nationality the applicant claimed at the time he first came into contact with the Service (now CIS) was that of Mexican. Therefore, this citizenship must be regarded as his operative nationality during these proceedings.

Mexico 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.

It is further noted that the applicant claims that he is the father of two United States citizen children, [REDACTED] and [REDACTED], and that his wife's last name is also [REDACTED]. This is the same last name that he used when apprehended in 1999, and further indicates that this is his true and correct last name; however, his name does not appear on either of the California birth certificates of these children.

Also, the applicant failed to disclose this apprehension, his use of a counterfeit temporary Form I-551, and his prior claim to be [REDACTED] a native and citizen of Mexico, on his Form I-821 application(s).

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 director's decision is withdrawn. The matter is remanded for further consideration and action.