

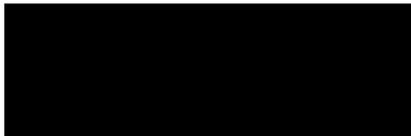
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FILE:



OFFICE: Vermont Service Center

DATE:

MAR 29 2007

[EAC 99 205 50463]

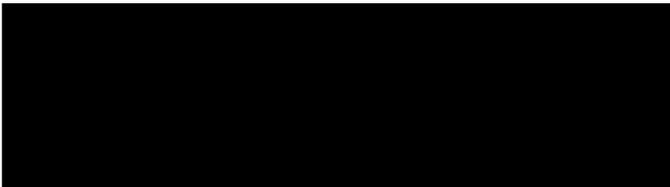
IN RE:

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. An appeal was dismissed by the Chief, Administrative Appeals Office. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion will be dismissed.

The applicant is a 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.

The applicant filed his initial Form I-821, Application for Temporary Protected Status, on June 4, 1999. The director denied the application on September 24, 2003, on the ground that the applicant failed to respond to a request for evidence, issued on July 18, 2003, that he had been physically present in the United States from January 5, 1999 until the date of filing, and therefore failed to establish his eligibility for TPS. The applicant appealed, and the AAO remanded the case to the director on January 26, 2005, for the issuance of a new decision setting forth the specific reasons for the denial. The director issued a new decision on March 16, 2005, on the grounds that the applicant failed to establish that he has been continuously resident in the United States since December 30, 1998, as required under section 244(c)(1)(A)(ii) of the Act, and continuously physically present in the United States from January 5, 1999, to the date his application was filed (June 4, 1999), as required under section 244(c)(1)(A)(i) of the Act. No appeal was filed within the 33-day filing period prescribed in 8 C.F.R. § 103.3(a)(2)(i) and 8 C.F.R. § 103.5a(b).

On July 5, 2006, counsel filed a Form I-290B asserting that the applicant was not provided timely notice of the denial of his initial TPS application, and therefore was unable to file a timely appeal. According to counsel, the applicant never received the director's decision of March 16, 2005, on the initial TPS application, was not informed of that decision in the director's subsequent denial on July 12, 2005, of the applicant's re-registration application [WAC 05 104 84439], and first learned about the denial of his initial TPS application in the AAO's decision of May 24, 2006, dismissing the appeal of the re-registration denial. Counsel cites the regulation at 8 C.F.R. § 244.10(c):

The decision of the director to deny [TPS] . . . shall be in writing served in person or by mail to the alien's most recent address provided to the Service and shall state the reason(s) for denial. Except as otherwise provided in this section, the alien shall be given written notice of his or her right to appeal a decision denying (TPS).

The service center did not mail the decision to the applicant's correct address, counsel indicates, which precluded the filing of a timely appeal. Counsel requests that the initial application be reopened.

A motion to reopen or reconsider, like an appeal, must be filed within thirty days of the underlying decision (33 days if the decision was served by mail), except that failure to file during this period may be excused at the Service's discretion when the applicant has demonstrated that the delay was reasonable and beyond the control of the applicant. See 8 C.F.R. § 103.5(a)(1)(i) and 8 C.F.R. § 103.5a(b).

The AAO notes that the applicant's address in March 2005, when the director's decision on remand was issued, was different from that at the time of the director's first decision in July 2003. Though there is no evidence in the record that the applicant properly informed CIS of his change of address by submitting a Form AR-11, CIS did have notice of the change of address as of January 26, 2005, when the applicant filed the re-registration

application mentioned above, which included his new address. Thus, the service center mailed its decision on the initial application, issued on March 16, 2005, to an incorrect address. Counsel's claim that the applicant did not receive it appears credible. Counsel's claim that he and the applicant did not know about that decision until the AAO's dismissal of the re-registration appeal in May 2006, however, is not credible. The service center's denial of the re-registration application on July 12, 2005 – which was mailed to the applicant's correct address – specifically referred to the initial TPS application, identifying it as EAC 99 205 50643, clearly stated that it had been denied on March 16, 2005, and explained that the re-registration application could not be approved because TPS had not been granted on the initial application. Thus, the applicant was informed of the denial of the initial TPS application upon his receipt of the decision denying the re-registration application in July 2005 – approximately ten months before the AAO's decision in May 2006.

Had the applicant filed his motion to reopen within a short time of his receipt of the service center's decision in July 2005 – the regulations suggest that it should have been within 33 days – the AAO might view the filing delay as “reasonable and beyond the control of the applicant” within the meaning of 8 C.F.R. § 103.5(a)(1)(i). Counsel has not demonstrated, however, that a ten-month delay in filing the motion after he and the applicant were informed of the denial of the initial TPS registration meets the regulatory definition of “reasonable and beyond the control of the applicant.” The AAO concludes that the motion to reopen, filed on May 24, 2006, must be dismissed.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. That burden has not been met since the motion to reopen was not filed within the time period prescribed in the regulations. Accordingly, the motion to reopen will be dismissed and the director's decision will be affirmed.

ORDER: The motion to reopen is dismissed. The director's decision of March 16, 2005, is affirmed.