



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

MI

[REDACTED]

FILE:

[REDACTED]

OFFICE: San Diego District Office
consolidated herein]

DATE: NOV 16 2007

[WAC 05 221 77820]

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:

[REDACTED]

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 District Director in San Diego, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be remanded to the District Director for further action and the entry of a new decision.

The applicant is a 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 on the grounds that the applicant failed to establish that she had been continuously physically present in the United States since March 9, 2001, in accordance with section 244(c)(1)(A)(1) of the Act.

On appeal counsel asserts that the applicant's absence from the United States was of short duration and for an emergency, and therefore did not interrupt her continuous physical presence in the United States as contemplated in the Act.

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 is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a 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 Temporary Protected Status 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.

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.

El Salvadoran nationals applying for TPS must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The initial registration period for El Salvadorans was from March 9, 2001, through September 9, 2002. Subsequent extensions of the TPS designation have been granted, with the latest extension valid through March 9, 2009, upon the applicant's re-registration during the requisite time period.

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. See 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. See 8 C.F.R. § 244.9(b).

The record shows that the applicant was born in El Salvador on February 1, 1972, first entered the United States during the 1990s, and filed her initial Form I-821, Application for Temporary Protected Status, at the California Service Center (CSC) on April 2, 2001, during the initial registration period for El Salvadoran nationals. The TPS application [WAC 01 147 50997] was approved by the CSC on April 30, 2001. An application for re-registration of TPS, along with a Form I-765, Application for Employment Authorization [WAC 03 239 52013], was filed at the CSC on August 20, 2003, and approved on January 15, 2004.

On March 7, 2005, the applicant applied again for re-registration of TPS [WAC 05 221 77820]. The applicant was interviewed by an officer in the San Diego District Office on March 17, 2005. In response to questions about her continuous physical presence in the United States, the applicant indicated that she had lived in this country since July 1997. The applicant stated that her only absences from the United States since then were from September to November 1998, when she spent two months in Mexico, and from October 22, 2003 to January 14, 2004, when she spent time in Guatemala and Mexico. According to the applicant, she went to Guatemala due to

the death of her mother-in-law, stayed a few weeks, and then went to Mexico to visit her parents. She remained with them until January 2004, because she was not feeling well, and returned to California on January 14, 2004. Based on the foregoing information, the District Director denied the re-registration application on May 9, 2005, on the ground that the applicant failed to establish that she had been continuously physically present in the United States since March 9, 2001, as required for El Salvadoran nationals under section 244(c)(1)(A)(i) of the Act.

Counsel filed a timely appeal and cited evidence in the record documenting the applicant's continuous residence in the United States since 1999.¹ With respect to her temporary departure from the country from October 2003 to December 2004, counsel elaborates on the information provided by the applicant in her interview at the San Diego District Office. As explained by counsel, on October 23, 2003, the applicant's husband, [REDACTED] was notified that his mother had died in Guatemala the previous day and would be buried the following day. A copy of the death certificate has been provided, which confirms that [REDACTED] died on October 22, 2003. The applicant and her husband proceeded directly to Guatemala. On the way back from Guatemala the applicant visited her parents in Mexico, extending her stay because of her pregnancy and a doctor's order of bed rest. A letter has been submitted from [REDACTED] of Oaxtepec Morelos, Mexico, dated June 22, 2005, stating that he attended the applicant in late November 2003, determined that she was pregnant and in danger of a miscarriage, and prescribed bed rest until her medical condition stabilized. In January 2004 the applicant felt well enough to travel, counsel explains, and on January 10, 2004, she proceeded to return to the United States. The record includes the report of a U.S. Border Patrol Agent, dated January 15, 2004, indicating that he arrested the applicant that day following her re-entry into the United States. The information provided by the applicant in the report confirms that she went to Guatemala because of her mother-in-law's death, left that country for Mexico on November 1, 2003, and proceeded to Morelos where she stayed with her mother until January 10, 2004. She then proceeded to the U.S. border and crossed illegally into Arizona. According to counsel, the applicant's absence from the United States was "brief, casual, and innocent," within the meaning of the law and applicable regulations, and therefore did not interrupt the applicant's continuous physical presence in the United States.

The phrase brief, casual, and innocent absence, as defined in 8 C.F.R. § 244.1, means a departure from the United States that satisfies the following criteria:

- (1) Each such absence was of short duration and reasonably calculated to accomplish the purpose(s) for the absence;
- (2) The absence was not the result of an order of deportation, an order of voluntary departure, or an administrative grant of voluntary departure without the institution of deportation proceedings; and
- (3) The purposes for the absence from the United States or actions while outside of the United States were not contrary to law.

¹ The record shows that the applicant was apprehended when she attempted to re-enter the United States following her two-month stay in Mexico on November 19, 1998, and returned to Mexico after an expedited removal proceeding. Not long afterward she succeeded in re-entering the United States without inspection.

Based on the foregoing evidence, the AAO determines that the applicant's absence from the United States from on or about October 23, 2003, to January 14, 2004, was brief, casual, and innocent within the meaning of the regulations applicable to TPS. Based on the entire record, therefore, the AAO concludes that the applicant has established her continuous physical presence in the United States since March 9, 2001, as required for TPS applicants from El Salvador under 8 C.F.R. § 244.2(b). Accordingly, the applicant has overcome the ground for denial cited in the District Director's decision.

The appeal cannot be sustained, however, because the record includes an identification record from the Federal Bureau of Investigation (FBI), based on the applicant's fingerprints, indicating that the applicant was arrested by the Los Angeles Police Department on February 6, 2006, and charged with one count of theft. As prescribed in section 244(c)(2)(B)(i) of the Act, and 8 C.F.R. § 244.4(a), an alien is ineligible for TPS if he or she has been convicted of any felony or two or more misdemeanors committed in the United States. The instructions regarding the usage of the FBI report, and the provisions of 28 C.F.R. § 50.12, state that "[i]f the information on the record is used to disqualify an applicant," the applicant shall be provided "the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record." The record of proceeding in this case does not contain the court's charging documents and final dispositions for the applicant's arrest to establish whether he was, in fact, convicted of either charge listed in the FBI report. Nor has the applicant been requested to submit the final court disposition of his arrest.

The case will be remanded, therefore, for the District Director to accord the applicant an opportunity to submit the final court disposition of her arrest on February 6, 2006, and any other arrest(s) in the United States. The director shall then enter a new decision.

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

ORDER: The case is remanded to the director for further action consistent with the above and the entry of a new decision.