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[REDACTED]

FILE:

[REDACTED]

OFFICE: CALIFORNIA SERVICE CENTER

DATE: SEP 24 2007

[WAC 06 166 70050]

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 Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The case will be remanded to the director for further action.

The applicant is 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 director denied the application because the applicant had failed to establish that he was eligible for late registration.

On appeal, counsel submits a statement and additional evidence.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien 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 § 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 condition described in paragraph (f)(2) of this section.

The term *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.

The term *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.

Persons applying for TPS offered to El Salvadorans must demonstrate 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 March 9, 2009, upon the applicant's re-registration during the requisite time period.

The initial registration period for El Salvadorans was from March 9, 2001, through September 9, 2002. The record shows that the applicant filed his initial application on March 15, 2006.

To qualify for late registration, the applicant must provide evidence that during the initial registration period he fell within at least one of the provisions described in 8 C.F.R. § 244.2(f)(2) above. If the qualifying condition or application has expired or been terminated, the individual must file within a 60-day period immediately following the expiration or termination of the qualifying condition in order to be considered for late initial registration. See 8 C.F.R. § 244.2(g).

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 Citizenship and Immigration Services (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 (NOID) dated July 24, 2006, 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 director listed in his decision the evidence furnished by the applicant in response to the NOID, and determined that the applicant did not provide any evidence or rebuttal to show that he qualified for late registration, nor did the applicant file an application for late registration within a 60-day period immediately following the expiration or termination of qualifying conditions. 8 C.F.R. § 244.2(g). The director, therefore, denied the application on September 14, 2006.

On appeal, counsel asserts that the director's statement that the applicant failed to provide evidence to establish eligibility for late registration is clearly erroneous. He states that the applicant provided a sworn affidavit stating that he had not received notice of the denial of his asylum application; counsel for the applicant obtained a letter from Miami Asylum Office Deputy Director stating that the Service customarily sent notice of

a decision but that she could not confirm that one had been sent out in this case;¹ and that the applicant provided numerous documents showing that he had a pending asylum claim. Citing regulations at 8 C.F.R. § 103.2(b)(19),² counsel asserts that the applicant was not given the requisite written notice of denial, and that such failure would cause the 60 days for late filing of a TPS application to be tolled.

A review of the record of proceeding indicates that a Warrant of Removal/Deportation, Form I-205, was issued in Los Fresnos, Texas, on March 11, 1998, based on the final order of removal [*in absentia*] by an Immigration Judge on January 14, 1988. On October 16, 1989, in Tampa, Florida, a notice of denial was issued advising the applicant that his Form I-589, Application for Asylum in the United States, was denied.

On February 11, 1992, the applicant filed another Form I-589. On August 24, 2004, a notice to appear for an interview at the Miami Asylum Office on September 14, 2004, regarding the applicant's asylum application was issued. At that interview, it was determined that the applicant was ineligible for ABC benefits and a letter, dated September 14, 2004, was issued by the Miami Asylum Office Director. That letter states, in part: "There is no credible evidence that you registered for ABC benefits, either by filing directly or, if Salvadoran, by applying for TPS." The letter continues, with original emphasis:

Although you are not eligible for benefits of the ABC settlement agreement, you may be able to continue pursuing any asylum application you may have filed under current regulations and procedures. If you previously were in deportation or exclusion proceedings before an Immigration Judge, or had a case on appeal to the Board of Immigration Appeals or federal district court, those proceedings will be reopened or resumed.

If you were previously ordered deported or excluded from the United States and you have not filed and been granted a motion to reopen, that previous order may be enforced against you and may be removed from the United States.

The record, in this case, and as asserted by counsel, contains no evidence that the applicant was notified that his asylum application was ultimately denied as provided in 8 C.F.R. § 103.2(b)(19). Additionally, the letter from the Miami Asylum Office Director dated September 14, 2004, advised the applicant of his ineligibility for benefits of the ABC settlement agreement, but falls short of a denial of the asylum application. Therefore, it appears that the asylum application remains pending.

Accordingly, the applicant has established that he has met the criteria for late initial registration described in 8 C.F.R. § 244.2(f)(2)(ii). The applicant has, therefore, overcome this finding of the director.

¹ In a letter dated August 15, 2006, addressed to the applicant's attorney, the Deputy Director, Miami [Florida] Asylum Office, states, in part: "USCIS records show that [REDACTED] applied for asylum on February 11, 1992. Adjudication of the applicant's case was suspended pending the resolution of issues related to the ABC litigation settlement agreement and the subsequent passage of NACARA. It appears that [REDACTED] was later found to be ineligible for benefits under the ABC settlement agreement. Because of the 1988 deportation order and his failure to depart the United States, USCIS did not have jurisdiction over the asylum applicant and closed the asylum case. See 8 CFR 208.2(b). The closure of a case for lack of jurisdiction is not technically a denial of the asylum application. When a case is closed for lack of jurisdiction, it would have been customary to send out or personally serve a letter notifying the applicant, but it is not done in every case. Because I do not have the file, I cannot confirm whether this was done."

² This regulation states, in part: "An applicant or petitioner shall be sent a written decision on his or her application, petition, motion, or appeal. Where the applicant or petitioner has authorized representation pursuant to § 103.2(a), that representative shall also be notified."

However, the evidence contained in the record of proceeding is insufficient to establish the applicant's qualifying continuous residence since February 13, 2001, and continuous physical presence since March 9, 2001, and as described in 8 C.F.R. § 244.2(b) and (c). Therefore, the case will be remanded to the director for further adjudication of the application. 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 Federal Bureau of Investigation fingerprint results report indicates that on June 12, 1987, the applicant was arrested for possession of a controlled substance-marijuana. The applicant subsequently submitted the records of the Circuit Court, Manatee County, Florida, under Case No. [REDACTED] indicating that a *nolle prosequi* was entered by the court on October 6, 1987. Therefore, the applicant is not ineligible for TPS based on this drug charge, pursuant to sections 244(c)(2)(B)(i) and 244(c)(1)(A)(iii) of the Act.

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 for appropriate action consistent with the above discussion and entry of a new decision.