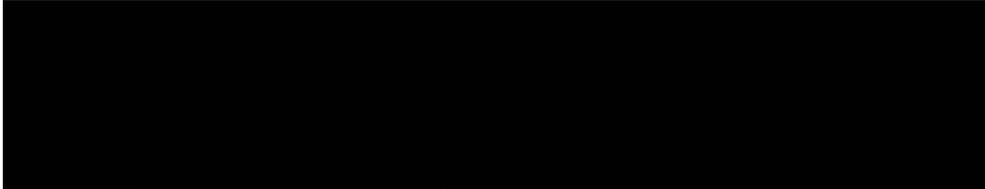


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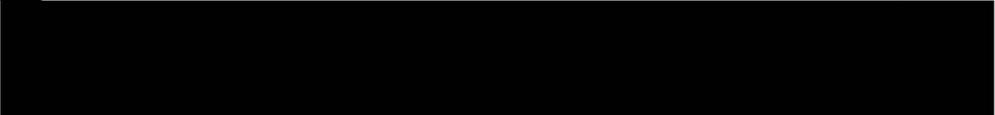
FILE:

Office: SAN FRANCISCO

Date: **MAR 03 2008**

INRE:

Applicant:

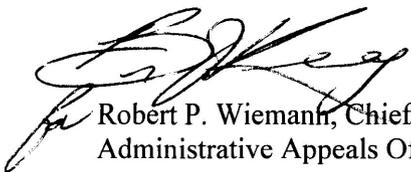


APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT: 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.


Robert P. Wieman, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The application will be reopened by the Chief, Administrative Appeals Office, and the case will be remanded for further consideration and action.

The applicant is stated to be a native and citizen of Honduras, is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The district director determined that the applicant was ineligible for TPS based on her reentry into the United States within five years after having been removed, and that she was not eligible, and may not apply, for any relief under section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). The district director, therefore, denied the application.

On appeal, the applicant states that she did depart the United States, but that she returned because of the conditions of her country after Hurricane Mitch. She further states that: (1) she was not ordered deported after December 30, 1998, which indeed would have disqualified her from applying for TPS because of the break in the continuous physical presence; (2) section 241(a) is not mentioned in the TPS regulations as a barrier to applying; (3) TPS is not a form of relief; it is a temporary stay of the pending deportation order because of the temporary conditions of her country; and (4) to enforce section 241(a) against TPS applicants would defeat the wishes of the Congress of the United States when it passed the TPS law.

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 and since December 30, 1998. 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 and since January 5, 1999. 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.

Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), states, in part:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), states, in part:

Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal is inadmissible.

Section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), states, in part:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The record reflects that on September 20, 1998, at Calexico, California, the applicant attempted to gain entry into the United States by presenting a border crossing card, Form 1-586, belonging to a Mexican national. The applicant was referred to immigration secondary and was subsequently turned over to the Port Enforcement Team for removal proceedings. In a sworn statement before an officer of the Service, the applicant admitted that she

purchased the document in Mexicali for the sum of \$100 U.S. dollars. She stated that if successful in her attempted entry, her intentions were to travel to Los Angeles, California, and look for work. The applicant was found inadmissible to the United States, pursuant to section 212(a)(6)(C)(i) of the Act, and she was ordered removed from the United States. The Form 1-296, Notice to Alien Ordered Removed/Departure Verification, shows that the applicant was removed to Mexico, on foot, from the Calexico, California, port of entry on September 20, 1998.

The Form 1-296 further shows that the applicant was advised that she was inadmissible to the United States under the provisions of section 212(a) of the Act or deportable under the provisions of section 237 of the Act, and that in accordance with the provisions of section 212(a)(9) of the Act, the applicant is prohibited from entering, attempting to enter, or being in the United States for a period of 5 years from the date of her departure from the United States as a consequence of having been found inadmissible as an arriving alien in proceedings under section 235(b)(1) or 240 of the Act.

The TPS application, filed on August 18, 1999, shows that the applicant claimed to have re-entered the United States without inspection on September 23, 1998, near Calexico, California. Because the applicant re-entered the United States within 5 years after her removal on September 20, 1998, the district director determined that the applicant was ineligible for TPS because she reentered the United States within 5 years of her removal, without permission from the Attorney General (now, the Secretary of the Department of Homeland Security), and denied the application.

Regulations at 8 C.F.R. § 244.3(c) list the grounds of inadmissibility that may not be waived. That list does not include inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(A) of the Act. However, there is no evidence of record that the applicant was offered the opportunity to apply for waivers of inadmissibility under these provisions.

It is noted that the applicant has submitted evidence to establish her nationality and identity, including the biographic page of Honduran passport, and her Honduran birth certificate.

The director's denial of the application will be withdrawn and the application is being remanded to the director for further adjudication. The director shall afford the applicant an opportunity to apply for waivers of inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(A) of the Act. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS offered to Hondurans.

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 initial application is reopened, the director's decision is withdrawn, and the application is remanded for a new decision.