U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] OFFICE: California Service Center DATE: MAY 16 2007

incorporated therein]
[WAC 05 231 70224 *as it relates to*
EAC 99 206 51339 and
EAC 04 010 50914]
[WAC 05 237 51685, *appeal*]
[WAC 06 009 52448, *appeal*]

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 California Service Center. Any further inquiry must be made to that office.

Cindy M. Gomez for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The initial application was denied by the Director, Vermont Service Center (VSC).[1] A re-registration application that was denied by the Director, California Service Center (CSC) is now before the Administrative Appeals Office (AAO) on appeal.[2] The appeals will be dismissed.

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

The applicant filed a TPS application during the initial registration period under receipt number EAC 99 206 51339, and under record [redacted] The director denied that application for abandonment on May 22, 2000, because the applicant failed to respond to an October 7, 1999 request to submit evidence to establish his qualifying continuous residence and continuous physical presence in the United States during the requisite periods. An application denied due to abandonment can not be appealed; however, an applicant may submit a motion to reopen within 30 days of the denial decision. The applicant submitted a Form I290-B, Notice of Appeal to the Administrative Appeals Unit, on January 5, 2005, and indicated that he was requesting that the 2000 application for TPS be reopened, or, in the alternative, that he be allowed to file for late initial registration. On May 3, 2005, a Form I-797C notice was sent to the applicant, informing him that CIS had reopened the application and the applicant would be notified once all action had been completed. The receipt number shown on the Form I-797C was EAC 04 010 59914, which is the receipt number for a subsequent Form I-821 filed by the applicant, and not the receipt number for the initial application.

On June 26, 2003, the applicant submitted a new Form I-821, Application for Temporary Protected Status, and a Form I-765, Application for Employment Authorization. These applications were rejected and returned to the applicant on July 22, 2003. The Form I-797, Notice of Action, accompanying the rejected applications, informed the applicant that because his initial TPS application had been denied on May 22, 2000, he was not required to register annually.

The record contains an affidavit from the applicant in which he stated that he believed he qualified for late registration pursuant to 8 C.F.R. § 244.2(f)(2)(i) as an alien who had ' "an application ... relief from removal pending . . ." ' The applicant claimed that he not been aware that his initial application had been denied until he received the July 22, 2003 rejection notice, and he asserted that he had filed a TPS application on or about August 13, 2003, within 60 days of receiving that notice, thus making him eligible for late registration.

The applicant submitted another TPS re-registration application and a new application for employment authorization with the Form I-290-B, Notice of Appeal to the Administrative Appeals Office, he filed on January 5, 2005. Counsel stated that the applicant was requesting that his initial TPS application be reopened, or, in the alternative, that he be allowed to apply for late registration. Counsel stated that the applicant had been the victim of an unscrupulous "notario" who failed to advise the applicant of the need to submit additional documentation to support his application, and that the applicant had been unaware of the denial of his initial application. He submitted a sworn statement from the applicant, stating that he had engaged the assistance of individuals at Ben's

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[1] A subsequent application and motion also were denied, EAC 04 010 50914.

[2] Counsel filed two appeals based upon the same decision; WAC 05 237 51685 and WAC 06 009 52448. Both will be addressed in this decision.

Music Store, in Hempstead, New York, to assist in the initial application process, and that the applicant believed that additional documentation he had provided to them had been filed timely. The applicant maintained that he only found out belatedly, that this had not been done. With the Form I-290B, counsel submitted copies of the applicant's initial TPS application; a Form I-797, Receipt Notice, for the initial TPS application which had been sent to the applicant at his address of record; a copy of the July 22, 2003, Form I-797, Notice of Action; and a Form AR-11, Alien's Change of Address Card, dated September 15, 2004.

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 designated by the Attorney General 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.

(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 conditions described in paragraph (f)(2) of this section.

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.

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.

Persons applying for TPS offered to Hondurans must demonstrate that they have continuously resided in the United States since December 30, 1998, and that they have been continuously physically present since January 5, 1999. The initial registration period for Hondurans was from January 5, 1999, through August 20, 1999. The record reveals that the applicant filed his initial application with the Immigration and Naturalization Service, now, Citizenship and Immigration Services (CIS), on July 28, 1999.

The burden of proof is upon the applicant to establish that he meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by 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 burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his own statements. 8 C.F.R. § 244.9(b).

The first issue in this proceeding is whether the applicant is eligible for late initial registration.

As stated above, the applicant did submit an application for TPS within the initial registration period; however, that application was denied for abandonment. In his subsequent appeals, the applicant maintains that he should be permitted to file a late registration application because he was not aware that his initial TPS application had been denied. He also asserted that his initial application was an application for "relief from removal pending," and he filed a new TPS application within 60 days of the date he maintains he first became aware of the denial of that application. The applicant's assertion is not persuasive. The October 7, 1999 request for additional evidence and the May 22, 2000 denial notice were mailed to the applicant's last known address, and neither was returned as undelivered. Furthermore, the notion that a TPS application is an application for "relief from removal" is incorrect. The provisions for late registration detailed in 8 C.F.R. § 244.2(f)(2) were not created to allow aliens who had abandoned their initial applications to circumvent the normal application and adjudication process. Rather, these provisions were created in order to ensure that TPS benefits were made available to aliens who did not register during the initial registration period for the various circumstances specifically identified in the regulations. While the applicant maintains that an unscrupulous music store "notario" failed to provide him with proper advice and assistance which caused his failure to submit the additional documentation requested by the director, and resulted in the director's decision to deny the initial application for abandonment, CIS is not responsible for the action or inaction of the applicant's representative. The responsibility to provide requested documentation rests with the applicant. As stated above, the request for additional evidence and the denial notice were mailed to the applicant's residence. It is noted, that throughout the appeal process, the applicant still has failed to provide any additional credible documentation to support his claim of eligibility for TPS. Notwithstanding the applicant's assertion, having an application for TPS pending [or denied] during the initial registration period does not render an alien eligible for late registration under 8 C.F.R. § 244.2(f)(2). Therefore, the application has not demonstrated that he is eligible for late registration. Consequently, the director's decision to deny the application for temporary protected status on this ground will be affirmed

The second issue in this proceeding is whether the applicant has established that he has continuously resided in the United States since December 30, 1998, and been continuously physically present since January 9, 1999. With his initial TPS application, the applicant submitted a May 26, 1999 letter from [redacted] Garden City, New York, pertaining to an "Assignment of Benefits" form (copy not provided) for services at the Nassau County Medical Center. On October 7, 1999, the applicant was requested to provide additional evidence of his continuous residence and continuous physical presence in the United States during the requisite periods, however, he did not submit any additional evidence. The only other evidence in the record consists of a copy of a Honduran passport in the applicant's name, which was issued in New York on November 8, 1999; and a receipt from [redacted]s Music, dated June 1, 1999. While the receipt and the copy of the passport indicate that the applicant was in the United States during the year 1999, he has not submitted sufficient evidence to establish continuous residence and continuous physical presence during the requisite periods. The applicant claims to have resided in the United States since October, 1997. It is reasonable to expect that he would be able to produce some additional contemporaneous documentation to support his claim. However, he has failed to do so. In addition, in a sworn statement signed on May 5, 2007, taken before an officer of Immigration and Customs Enforcement (ICE), the applicant admitted that he had left the United States on April 18, 2006, and had remained abroad until April 2007. Further, the applicant has also failed to indicate that his absence was brief, casual, and innocent, as defined in 8 C.F.R. § 244.1. Therefore, the applicant cannot establish that he has met the continuous residence and continuous physical presence criteria

described in 8 C.F.R. §§ 244.2(b) and (c). Consequently, the director's decision to deny the application for TPS will be affirmed.

The next issue in this proceeding concerns the applicant's eligibility to apply for re-registration. The applicant filed a Form I-821, Application for Temporary Protected Status, on May 19, 2005, under receipt number WAC 05 231 70224, and indicated that he was re-registering for TPS. The director denied the re-registration application because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS. The applicant filed two appeals of the denial decision of the current re-registration application; one on August 25, 2005, and a second on September 28, 2005. The appeals will be consolidated and will be addressed in this decision.

If the applicant is filing an application as a re-registration, a previous grant of TPS must have been afforded the applicant, as only those individuals who are granted TPS must register annually. In addition, the applicant must continue to maintain the conditions of eligibility. 8 C.F.R. § 244.17.

In this case, the applicant has not previously been granted TPS. Therefore, he is not eligible to re-register for TPS. Consequently, the director's decision to deny the application for re-registration will be affirmed.

Beyond the decision of the director, it is noted that the record contains a Form I-213, Record of Deportable Alien, dated October 7, 1996. According to the information the applicant provided to the U.S. Border Patrol at that time, he is a citizen of Mexico, and he was born in Honduras. The applicant also stated that he had been abandoned by his mother at birth, and that she is a citizen of Honduras.

In *Chee Kin Jang v. Reno*, 113 F. 3d 1074 (9th Cir. 1997), the United States Court of Appeals 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.

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)."

While the applicant, in this case, entered the United States without inspection, the nationality the applicant claimed and/or established at the time he first came into contact with the Service (now CIS) was Mexican. On subsequent TPS applications, the applicant presented himself as a Honduran.

In addition, in the May 5, 2007 sworn statement, the applicant stated that he had left the United States for one year to care for his mother who was ill, however, in 1996, he had stated that he had been abandoned by his mother.[3] The applicant has not explained these discrepancies. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The applicant has failed to submit any objective evidence to explain or justify the discrepancies he has provided to the U.S. Border Patrol and to CIS concerning his nationality and his mother. Therefore, the reliability of the remaining evidence offered by the applicant is suspect.

An alien shall not be eligible for temporary protected status under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

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[3] The applicant, when claiming to be a Mexican citizen, stated that his mother's name was [redacted], and that his parents were born in Mexico. His current birth certificate, now indicates his mother's name as [redacted]

Felony means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

Misdemeanor means a crime committed in the United States, either

(1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
(2) A crime treated as a misdemeanor under the term "felony" of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor.

It is noted that the applicant stated on his applications for TPS that he had never been arrested or deported. However, the record of proceeding reflects that the applicant was arrested in Hempstead, New York, on December 25, 2000, and charged with: Count 1, Resisting Arrest, PL 205.30, a misdemeanor, NCIC 4801; and Count 2, Obstruct Governmental A, PL 195, a misdemeanor. The record indicates that the applicant was convicted on one of these charges. The applicant also was arrested on November 9, 1999, at Mineola, New York, for petit larceny, and convicted of that offense, a misdemeanor. The applicant is ineligible for TPS due to his two (or more) misdemeanor convictions, detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the application will also be denied for this reason.

In addition, it is further noted that the record contains a Form I-213, Record of Deportable Alien, dated October 7, 1996. The applicant stated at that time that he was a citizen of Mexico. The applicant failed to appear at a scheduled hearing on July 30, 1997, and he was ordered deported to Mexico *in absentia.* The applicant failed to appear for his enforced departure on July 13, 1998, through the applicant's own sworn statement, however, taken on May 5, 2007, he had departed the United States on or about April 18, 2006, at JFK International Airport, New York, to Honduras, and did not return to the United States until on or about April 7, 2007. Thus, he affected his own deportation (removal) under the formal order of deportation (removal) issued at New York on March 5, 1998.[4]

Finally, it is noted that the applicant states that he returned to the United States in 2007 with the express purpose of surrendering himself to the criminal justice system based on outstanding felony charges.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. An alien applying for TPS has the burden of proving that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden.

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[4] On his Forms I-821, the applicant failed to state that he had been previously apprehended and ordered deported (removed) under his alias at that time.

ORDER: The appeal is dismissed.