U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 29 2008

[EAC 06 334 75863]

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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be 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 because the applicant failed to establish he was eligible for late registration. The director also found that the applicant had failed to establish his qualifying continuous residence and continuous physical presence in the United States during the requisite periods.

On appeal, counsel asserts that the applicant was not advised, either by his previous counsel, Immigration and Customs Enforcement (ICE), or the immigration judge (IJ), that he was eligible for TPS. Counsel further argues that the applicant's removal from the United States in 2006 was illegal, and thus did not interrupt his qualifying continuous residence and continuous physical presence in the United States.

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.

(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.

Persons applying for TPS offered to El Salvadorans 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 designation of TPS for El Salvadorans has been extended several times, with the latest extension valid until 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 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).

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

The initial registration period for El Salvadorans was from March 9, 2001, through September 9, 2002. The record reveals that the applicant filed his application with Citizenship and Immigration Services (CIS) on August 14, 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.

On March 7, 2007, the director notified the applicant that he had submitted sufficient evidence to establish his eligibility for late registration as set forth in 8 C.F.R. § 244.2(f)(2). However, the applicant was requested to

submit evidence establishing his qualifying continuous residence and continuous physical presence in the United States. Nonetheless, the director denied the application on May 18, 2007, because the applicant had not established that he was eligible for late registration.

Documentation in the record, however, reveals that the applicant contends that he is eligible for late registration based on a pending Form I-485, Application to Register Permanent Resident or Adjust Status, and the failure of immigration officials to notify him that he was eligible for TPS.

The record reflects that the applicant was the beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker. Based on this approval, the applicant filed a Form I-485 application on May 9, 2002. On December 8, 2005, the District Director, Los Angeles, California, rejected the application pursuant to 8 C.F.R. § 245.2(a) because the applicant had entered removal proceedings before an IJ in 1996. On April 8, 1997, the IJ had granted the applicant voluntary departure from the United States on or before October 8, 1997, with an alternate order of deportation to El Salvador. The record does not reflect that the applicant appealed the IJ's order.

To qualify for late registration, the applicant was therefore required to file his application for TPS within 60 days following the rejection of his Form I-485 application. The applicant did not file a motion to reopen or reconsider the director's decision. He filed an application for TPS on August 14, 2006, more than eight months following the rejection of his Form I-485 application.

The record further reveals that ICE apprehended the applicant on December 8, 2005. The applicant filed a motion before the IJ to reopen removal proceedings and also requested approval of his Form I-485 application. The IJ denied the motion on January 20, 2006, for lack of jurisdiction. The IJ noted that if the applicant had departed the United States within the voluntary departure period as he claimed, then the court lacked jurisdiction because removal proceedings would have been concluded. The court noted that alternatively, if the applicant failed to depart the United States during the voluntary departure period, the motion was untimely filed. The court also rejected the applicant's request for a stay of removal, and he was removed from the United States on April 3, 2006. The applicant was apprehended again on July 25, 2006, attempting to cross the border into the United States without inspection.

Counsel asserts that the applicant received ineffective assistance of counsel because his prior counsel failed to inform him of his eligibility for TPS. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The applicant has failed to submit an affidavit in support of his claim, evidence confirming that counsel has been notified of the incompetency claim, or evidence demonstrating that a complaint, based upon the allegations, has been filed with the appropriate disciplinary authorities. To the

extent that the applicant has failed to produce evidence sufficient to substantiate an ineffective assistance of counsel claim, the AAO will review the record applying standard statutory and regulatory eligibility requirements and burdens of proof.

The applicant also alleges that ICE and the IJ breached their "affirmative duty" by failing to notify the applicant of his eligibility for TPS. As noted by counsel, however, section 244(b)(4) of the Act and 8 C.F.R. § 244.7(d) impose this requirement on the Department of Homeland Security, the IJ and the Board of Immigration Appeals if the applicant had a pending deportation or exclusion proceeding, *at the time the foreign state was designated for TPS status*. The record reflects that ICE did not take custody of the applicant until December 2005, four years after El Salvador was designated for TPS status. Therefore, there was no "affirmative duty" of ICE or the IJ to notify the applicant, who was represented by counsel, of his potential eligibility for TPS in 2005.

The evidence submitted by the applicant does not establish that he has met any of the criteria for late registration described in 8 C.F.R. § 244.2(f)(2). Consequently, the director's conclusion that the applicant had failed to establish his eligibility for late registration will be affirmed.

The second issue in this proceeding is whether the applicant has established his continuous residence in the United States since February 13, 2001, or his continuous physical presence in the United States since March 9, 2001.

On March 7, 2007, the applicant was requested to submit evidence establishing his qualifying continuous residence and continuous physical presence in the United States. In response, the applicant submitted documentation dated in the qualifying period including copies of Forms W-2, Wage and Tax Statements, copies of earnings statements, a copy of his marriage license, a copy of his child's California birth certificate, and an employment verification letter.

In denying the application, the director noted that, following his July 25, 2006, apprehension, the applicant admitted that he had crossed the border without inspection on July 24, 2006. The director concluded that this was evidence that the applicant could not have remained continuously present in the United States since March 9, 2001.

On appeal, counsel asserts that, as the applicant was not informed of his eligibility for TPS, his removal from the United States in April 2006 was unlawful and his absence during that time cannot be considered an interruption of his continuous presence in the United States.

A temporary absence during the qualifying period may not interrupt continuous presence if it is brief, casual, and innocent. 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.

As discussed above, counsel's assertions that ICE and the IJ failed in their "affirmative duty" to notify the applicant of his potential eligibility for TPS is without merit. Therefore, the applicant has provided no evidence that his removal from the United States on April 3, 2006, was in contravention of law. Accordingly, as his absence from April 3, 2006, until his apprehension on July 25, 2006, was the result of an order of deportation, his absence was not casual or innocent and therefore interrupted his continuous physical presence in the United States during the qualifying period. He has, therefore, failed to establish that he has met the criteria described in 8 C.F.R. § 244.2(c). Consequently, the director's decision to deny the application for TPS on these grounds will also be affirmed.

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.

ORDER: The appeal is dismissed.