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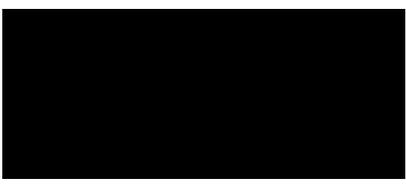
Date: AUG 12 2005

IN RE: 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:



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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, California Service Center. An appeal from the director's decision was rejected by the Director of the Administrative Appeals Office (AAO) as untimely filed. A subsequent motion to reopen and reconsider was dismissed by the Director, California Service Center. The matter will be reopened *sua sponte*, and the prior decisions of the service center director and the director of the AAO will be affirmed.

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.

On March 16, 2004, the director denied the application because the applicant failed to establish continuous physical presence in the United States since March 9, 2001.

Counsel for the applicant filed an appeal from the director's decision on April 20, 2004. On appeal, counsel asserted that the applicant had previously been granted TPS. Counsel also asserted that the applicant had submitted with the previous TPS application sufficient evidence to establish his qualifying continuous residence and continuous physical presence in the United States during the requisite periods.

On December 14, 2004, the Director of the AAO rejected the appeal as untimely filed.

On December 31, 2004, counsel for the applicant filed a motion to reopen and reconsider. On motion, counsel objected to the rejection of the appeal as untimely filed because it was mailed on the 33rd day after the date of issuance of the Notice of Decision.

The service center director dismissed the motion on April 1, 2005, finding that it did not meet the requirements for a motion to reopen or a motion to reconsider. The service center director further noted that no new evidence had been submitted on motion to overcome the grounds for denial of the application.

In a letter dated May 9, 2004, counsel for the applicant objects to the denial of the application. Counsel asserts that the application in this proceeding is not an initial application for TPS, but rather an application for the required annual re-registration after the applicant had been granted TPS. Counsel contends that Citizenship and Immigration Services (CIS) had already determined the applicant's eligibility for TPS, and had provided no notice to the applicant of a subsequent determination that he had not provided sufficient evidence to establish his qualifying continuous residence and continuous physical presence in the United States during the requisite periods.

Pursuant to 8 C.F.R. § 103.5(a)(1)(ii), the official having jurisdiction over a motion to reopen or reconsider is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction.

In this case, the AAO issued the latest decision in the proceeding. Counsel filed a motion objecting to the rejection of the appeal as untimely filed. Counsel's motion to reopen and reconsider should have been forwarded to the AAO. Therefore, the matter will be reopened *sua sponte*.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

Pursuant to 8 C.F.R. § 103.5(a)(3), a motion to reopen must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In this case, counsel, on motion, objected to the rejection of the appeal as untimely filed. Counsel contended that the appeal was timely filed because it was mailed on the 33rd day from the date of issuance of the Notice of Decision dated March 16, 2004. In support of his contention, counsel cited 8 C.F.R. § 103.5a(b) as follows: "Service by mail is complete upon mailing."

Counsel submitted a FedEx Shipment record indicating that the motion package was presented at a FedEx office on April 19, 2004, and delivered to the California Service Center on April 20, 2004.

Pursuant to 8 C.F.R. § 103.3(a)(2), the affected party must file the complete appeal, including any supporting brief with the office where the unfavorable decision was made, within 30 days after service of the decision. Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period.

In this case, the service center director issued the Notice of Decision on March 16, 2004. Counsel did not mail the appeal to the California Service Center until April 19, 2004, the 33rd day after the issuance of the Notice of Decision. The appeal was received at the California Service Center on April 20, 2004, the 34th day after the date of issuance of the Notice of Decision.

Counsel's assertion that the service of the appeal was complete upon mailing is incorrect. The regulation cited by counsel, 8 C.F.R. § 103.5a(b), refers to the authorized means of service by CIS on affected parties, attorneys, and other interested persons of notices, decisions, and other papers (except warrants and subpoenas), in administrative proceedings before CIS.

In this case, as previously stated, the Notice of Decision was mailed to the applicant on March 16, 2004. Service of the Notice of Decision was complete upon mailing. The applicant had three additional days to file the appeal. In this case, the appeal was not filed until the 34th day. Therefore, the prior decision of the AAO to reject the appeal as untimely filed will be affirmed.

It is noted that counsel asserts that the only reason for "denial" of the appeal by the AAO was because the appeal was submitted late. This is not accurate. The appeal was "rejected," as discussed above. The reasons for denial were not reviewed, or considered to have been overcome.

In his letter dated May 9, 2004, counsel contends that the applicant has previously been granted TPS, and the current application was an application for re-registration. Counsel contends that CIS, in granting the initial TPS

application, had already determined that the applicant had submitted sufficient evidence to establish his qualifying continuous residence and continuous physical presence in the United States.

There is no indication in CIS records that the applicant had previously been granted TPS, or that the current application is actually an annual application for re-registration. The applicant indicated on the Form I-821, Application for Temporary Protected Status, that he was filing an initial application for TPS. The application denied, and the first application before CIS, was filed on September 18, 2001.

Counsel further states in his letter dated May 9, 2004:

The decision does not claim that the C.S.C. made any request for evidence of residence between March 9, 2001 and September 2002. The decision does not even suggest how the applicant was to know that specific evidence of residence for this specific period of time was required.

The record reflects that two requests for evidence were mailed to the applicant affording him an opportunity to provide additional evidence to establish his qualifying continuous residence and continuous physical presence in the United States during the requisite periods. The first request was mailed to the applicant on April 6, 2002, and the second was mailed to the applicant on August 15, 2002. Both requests were mailed to the applicant at his most current address, but the record does not contain a response from the applicant to either request. Therefore, the director properly denied the application because the applicant had not submitted any evidence to establish his qualifying continuous physical presence in the United States during the requisite period.

Counsel submits with his letter additional evidence in an attempt to establish the applicant's qualifying continuous physical presence in the United States. As previously stated, a motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

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.

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 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 September 9, 2006, upon the applicant's re-registration during the requisite period.

The applicant has submitted the following evidence in an attempt to establish his continuous physical presence in the United States since January 5, 1999:

1. a photocopy of a mailing envelope postmarked December 13, 1999;

2. a photocopy of an Urgente Express mailing envelope postmarked February 10, 1998;
3. a photocopy of the biographic page of the applicant's Salvadoran passport issued by the Salvadoran consulate in Los Angeles, California, on February 7, 2000;
4. an employment letter dated May 13, 2004, from Ismael Aleman of Dependable Janitorial Service in San Jose, California, stating that the applicant was employed by his company from June 15, 1996 to May 28, 2001;
5. a letter dated May 17, 2004, from Marvin Aleman stating that the applicant was "renting from" him at [REDACTED] San Jose, California, from April 23, 1996 to October 30, 2001;
6. a photocopy of a 2002 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, from Alliance Cleaning Service reflecting an annual income of \$9,627.03;
7. an employment letter dated May 12, 2004, from [REDACTED] Grocery Manager [REDACTED] in San Jose, California, stating that the applicant has worked for his store since November 19, 2002;
8. a photocopy of the applicant's 2003 IRS Form 1040EZ, Income Tax Return for Single and [REDACTED] With No Dependents; and,
9. a photocopy of the applicant's 2003 IRS Form W-2 from [REDACTED]

The employment letter from Ismael Aleman (No. 4 above) has little evidentiary weight or probative value as it does not provide basic information that is expressly required by 8 C.F.R. § 244.9(a)(2)(i). Specifically, Mr. [REDACTED] letter is not attested to under penalty of perjury. Further, Mr. [REDACTED] does not provide any information regarding the applicant's duties, his exact periods of layoff, if any, or the address where the applicant resided during the period of his employment.

Similarly, the employment letter from Mr. [REDACTED] (No. 7 above) has little evidentiary weight or probative value as it does not provide basic information that is expressly required by 8 C.F.R. § 244.9(a)(2)(i). Specifically, Mr. [REDACTED] letter is not attested to under penalty of perjury. Further, Mr. [REDACTED] does not provide any information regarding the applicant's duties with the company, his exact periods of layoff, if any, or the address where the applicant has resided since he began working for the company.

The 2002 IRS Form W-2 from Alliance Cleaning Service (No. 6 above) is not sufficient to establish the applicant's qualifying physical presence in the United States in 2002, because it does not reflect the specific months the applicant worked for Alliance Cleaning Service during the year 2002. Additionally, the 2003 IRS Form W-2 is not sufficient to establish the applicant's continuous physical presence in the United States during 2003, because it does not reflect the specific months the applicant worked for [REDACTED] during the year 2003.

The applicant has submitted only employment letters to establish his residence and physical presence in the United States in 2001. The applicant claims to have resided in the United States since 1996. It is reasonable to expect that the applicant would have some type of contemporaneous evidence to support these employment letters; however, no such evidence has been submitted.

The applicant has not submitted sufficient evidence to establish that he meets the criteria described in 8 C.F.R. § 244.2(b). Therefore, it is concluded that the service center director properly denied the application because the applicant failed to establish continuous physical presence in the United States since January 5, 1999. It is further concluded that the director of the AAO properly rejected the appeal as untimely filed. The prior decisions of the service center director and the director of the AAO will be affirmed.

Beyond the decision of the director, the applicant has also failed to establish continuous residence in the United States since December 30, 1998. Therefore, he has not met the criteria described in 8 C.F.R. § 244.9(c), and the application also must be denied for this reason.

An alien applying for temporary protected status 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 prior decisions of the service center director and the director of the AAO are affirmed.