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

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 05 2005

[SRC 01 216 55505]

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: 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.

Cindy M. Gomez for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied due to abandonment by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO). Ordinarily when an application is denied due to abandonment, the AAO lacks jurisdiction over the corresponding motion. In this case, however, the application was denied due to abandonment in error, and, therefore, the submission will be heard as an appeal. The appeal will be dismissed.

The applicant claims to be 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 initially denied the application after determining that the applicant had abandoned her application by failing to appear for scheduled fingerprinting.

The regulations at 8 C.F.R. § 103.2(e)(1), (2), and (4) describe the requirements for fingerprinting that the applicant must meet in order to comply with the requirements for this type of benefit application.

If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied. 8 C.F.R. § 103.2(b)(13). This regulation further provides that an application shall be considered abandoned and shall be denied if: an individual requested to appear for fingerprinting does not appear; CIS does not receive his or her request for rescheduling by the date of the fingerprinting appointment; or, the applicant has not withdrawn the application.

A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen. 8 C.F.R. § 103.2(b)(15).

The record reveals that the applicant filed her initial TPS application on May 23, 2001. On August 16, 2004, the director issued a decision, informing the applicant that her TPS application had been deemed abandoned and was denied for lack of prosecution due to the applicant's failure to appear for her scheduled fingerprinting appointment. The director advised the applicant that, while the decision could not be appealed, the applicant could file a motion to reopen.

On appeal, the applicant states that she had moved and did not receive the fingerprint scheduling notice. She states that she would like another appointment for fingerprinting, and asks that her case be reopened. In support of the appeal, the applicant submits additional evidence relating to her continuous residence and continuous physical presence in the United States.

The record reveals that the Fingerprint Notification dated December 23, 2002, requesting the applicant's appearance on January 23, 2003, for required fingerprinting, was mailed to the applicant's previous address, and was returned to CIS by the United States Postal Service marked as undeliverable. The applicant had provided a new address three months earlier on her September 23, 2002, application for re-registration. Because the fingerprint notification was mailed to an incorrect address, the determination that the applicant had abandoned her application was made in error.

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 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 section 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 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 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. 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 validity of the latest extension until September 9, 2006, 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 reveals that the applicant filed her initial TPS application with the Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), on May 23, 2001.

The burden of proof is upon the applicant to establish that she 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 her burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from her own statements. 8 C.F.R. § 244.9(b).

The applicant's record contains another fingerprint notification for the applicant to appear on April 3, 2004, to have her fingerprints taken. Subsequent to the director's decision on August 16, 2004, the record contains a Federal Bureau of Investigation (FBI) fingerprint results report, processed by the FBI on November 14, 2004, reflecting that the applicant was identified as having a record as of that date.

It is noted that the FBI fingerprint results report indicates that the applicant has another record of proceedings under [redacted] This record indicates that the applicant was apprehended by the United States Border Patrol on October 14, 1997, while attempting entry into the United States at the Gateway Bridge, Brownsville, Texas. The applicant was placed in expedited removal proceedings after posing as an imposter and presenting a Form I-186 card in the name of [redacted], which she attempted to use for border crossing. At the time of her apprehension, the applicant gave her name as [redacted] and gave her place of birth and permanent residence as [redacted] Mexico [emphasis added]. She also indicated that both of her parents were Mexican nationals. The applicant was found inadmissible to the United States under the provisions of Section 212(a)(6)(C)(i), and was removed from Brownsville, Texas, to Mexico on October 14, 1997.

The applicant now claims to be a native and citizen of El Salvador. With her Form I-821, Application for Temporary Protected Status, the applicant submitted a birth register, with English translation. She did not, however, present a passport or national identity document from her country of origin bearing a photograph and/or fingerprint.

In *Chee Kin Jang v. Reno*, 113 F. 3d 1074 (9th Cir. 1997), the United States Court of Appeals found that the Service reasonably interpreted the term "PRC national" in CSPA (Chinese Student Protection Act) to Exclude Chinese dual nationals who did not declare citizenship of PRC (People's Republic of China) when they entered the United States, and that the Service's treatment of PRC dual nationals, depending on whether they entered under a PRC passport or a passport of a different country, was reasonable. The Court 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. Thus, a dual national CSPA principal applicant must have claimed PRC nationality at the time of his or her last entry into 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).

When the applicant was apprehended, she claimed to be a national and citizen of Mexico throughout her immigration proceedings conducted under The nationality the applicant claimed and/or established at the time she first came into contact with the Service (now CIS) was that of Mexico. Therefore, this citizenship must be regarded as her operative nationality during these proceedings.

Mexico is not a designated foreign state under Section 244 of the Act. The applicant, therefore, does not meet the eligibility requirements of being a national of a state designated under section 244(b) of the Act. The applicant has not demonstrated that her "operative nationality" is that of a TPS-designated country.

On each of her Form I-821 applications the applicant checked the box indicating that she had never been under immigration proceedings. However, as discussed above, the record reveals that the applicant was under immigration proceedings and was previously removed to Mexico. The applicant failed to submit any objective evidence to explain or justify her claim of two different nationalities. 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Therefore, the applicant has failed to submit sufficient evidence to conclusively establish her nationality, as required under the regulations in 8 C.F.R. § 244.2(a), and the application must be denied for this reason.

Further, it was only through the FBI records checks that this information was discovered. Therefore, the applicant may also be excludable under 8 C.F.R. § 212(a)(6)(C) for willful failure to disclose a fact material to the adjudication of her application.

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 not met this burden.

ORDER: The appeal is dismissed.