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

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FILE:

[WAC 01 228 53937]

Office: CALIFORNIA SERVICE CENTER

Date:

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

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.

The record reveals that the applicant, who was then a 15-year-old minor, presented himself for immigration inspection at the Los Indios, Texas, Port of Entry on June 9, 1998, claiming to be a United States citizen. The applicant presented a Brownsville, Texas, birth registration card in the name [REDACTED]'s date of birth May 9, 1986. Upon further questioning, the applicant was admitted in a sworn statement before immigration officers that he had made a false claim to United States citizenship. The applicant stated that he was a Mexican citizen born in Matamoros, Mexico. He was turned over to Mexican immigration authorities at Progreso, Texas. On June 10, 1998, Mexican immigration authorities returned to the applicant to the custody of the Immigration and Naturalization Service (now Customs and Border Protection) because the applicant had been determined to be a citizen of El Salvador, not Mexico. The subject was placed in removal proceedings. He was subsequently released to the custody of his mother, [REDACTED] CIS registration number [REDACTED]

The applicant had his first Master Calendar Hearing on September 21, 1999. At that time, the applicant, through counsel, requested a continuance in order to file a motion to administratively close his removal proceeding so that the applicant could pursue relief under NACARA (the Nicaraguan and Central American Relief Act). The Immigration Judge continued the Master Calendar hearing to December 14, 1999, and subsequently to January 18, 2000. On that date, counsel informed the Immigration Judge that it appeared the applicant would not qualify for suspension of removal under NACARA and withdrew his attempt to administratively close the applicant's removal proceeding. Counsel informed the judge that the applicant instead intended to apply for asylum and for withholding of removal. Although the applicant had already been in the United States over one year at that time, counsel asserted that the applicant was still eligible to apply for asylum because the applicant's application for relief from removal under NACARA was pending during the requisite period to file an asylum application. The applicant was allowed to withdraw his application for relief under NACARA and instead file an application for asylum and for withholding of removal.

While the applicant's removal proceeding was still pending, El Salvador was designated for Temporary Protected Status on March 9, 2001. The applicant filed a Form I-821, Application for Temporary Protected Status, on April 16, 2001.

On September 15, 2003, in a hearing before the Immigration Judge in San Francisco, the applicant withdrew his application for asylum and for withholding of removal. The Immigration Judge granted the applicant the privilege of voluntary departure on or before January 13, 2004, with an alternate order of removal if the applicant failed to depart in compliance with the grant of voluntary departure. It is noted that the applicant's TPS application was still pending on September 15, 2003, the date of the Immigration Judge's order. Counsel, who had failed to inform the Immigration Judge that the applicant had a pending TPS application, waived appeal on all issues.

On January 14, 2004, counsel filed a Form I-246, Application for Stay of Deportation or Removal. Counsel stated on the Form I-246 that the Immigration Judge had not been informed the applicant had a pending TPS application before CIS at the time of the applicant's removal hearing on September 15, 2003. There is no indication in the record of proceeding that the applicant's application for stay of removal has been adjudicated.

On August 6, 2004, the district director concluded that the applicant was ineligible for Temporary Protected Status because he had been found inadmissible to the United States under section 212(a)(6)(c)(ii) of the Act and denied the application, stating "[u]nder Section 244A(c)(2)(A)(ii) [of the Act], this ground of inadmissibility may not be waived."

On appeal, counsel for the applicant states that the applicant was erroneously denied TPS "despite his admission to claiming United States citizenship at entry." Counsel states that the applicant lives with his mother [REDACTED], and that [REDACTED] is fully dependent on her son for financial support. Counsel asserts that granting the applicant TPS "is consistent with the policy of the law to keep families together."

Pursuant to 8 C.F.R. § 244.2(a), paragraphs (4), (5)(A) and (B), and (7)(A)(i) of section 212(a) of the Act shall not render an alien ineligible for Temporary Protected Status.

Pursuant to 8 C.F.R. § 244.3(c), CIS may not waive the following grounds of inadmissibility under section 212(a) of the Act:

- (1). Paragraphs (2)(A)(i), (2)(B), and (2)(C) (relating to criminals and drug offenses):
- (2) Paragraphs (3)(A), (3)(B), (3)(C), and (3)(D) (relating to national security); or,
- (3) Paragraph (3)(E) (relating to those who assisted in the Nazi persecution.)

Pursuant to 8 C.F.R. § 244.3(b), Citizenship and Immigration Services (CIS) **may waive inadmissibility under any other provision of section 212(a) of the Act** in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is inadmissible on grounds that may be waived, he or she shall be advised of the procedures for applying for a waiver of grounds of inadmissibility on Form I-601, Application for Waiver of Grounds of Excludability. (Emphasis added.)

In this case, the district director correctly stated that the applicant is inadmissible to the United States under section 212(a)(6)(c)(ii) of the Act. However, the district director erroneously stated that there is no waiver of this ground of inadmissibility. Inadmissibility to the United States under section 212(a)(6)(c)(ii) of the Act is not one of the grounds of inadmissibility that may not be waived as set forth at 8 C.F.R. § 244.3(c). Pursuant to 8 C.F.R. 244.3(b), inadmissibility under section 212(a)(6)(c)(ii) of the Act may be waived on a Form I-601, Application for Grounds of Excludability.

The district director shall provide the applicant with the opportunity to file a Form I-601 and shall fully adjudicate the Form I-601 and the Form I-821.

Accordingly, the matter is remanded for action consistent with the foregoing. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS. 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 director's decision is withdrawn. The matter is remanded for further consideration and action.