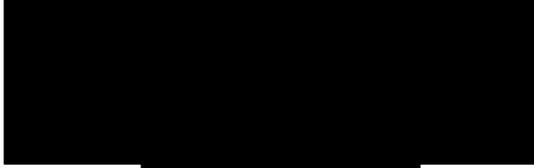




U.S. Citizenship  
and Immigration  
Services

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invasion of personal privacy

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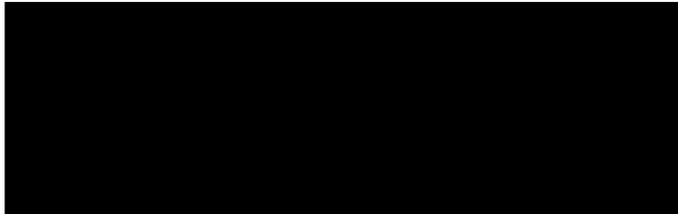
OFFICE: California Service Center

DATE: AUG 22 2007

consolidated herein]  
[EAC 99 193 50256 –  
as it relates to WAC 05 063 70128]

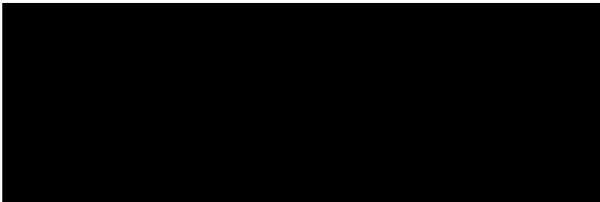
IN RE:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The initial application was granted, then withdrawn, by the Director, Vermont Service Center (VSC). A second application was denied by the Director, California Service Center (CSC). An appeal from the CSC Director's decision was dismissed by the Chief, Administrative Appeals Office (AAO). The matter is now before the AAO on a late-filed motion to reopen. The motion will be granted and both applications will be remanded to the CSC Director for further consideration and the entry of new decisions on each.

The applicant is a citizen of Honduras 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 shows that the applicant filed an initial Form I-821, Application for Temporary Protected Status, at the Vermont Service Center on April 5, 1999 [EAC 99 193 50256], which was approved on December 20, 1999. On December 4, 2003, the VSC Director issued a notice of intent to withdraw (NOIW), advising the applicant that she had been found inadmissible to the United States on October 25, 1998 under section 212(a)(6)(C) of the Act, and that she must file a Form I-601, Application for Waiver of Grounds of Excludability, to forestall a withdrawal of her TPS. On January 14, 2005, the VSC Director withdrew the applicant's TPS, stating that she had not responded to the NOIW and therefore failed to overcome the grounds for withdrawal.

On December 2, 2004, the applicant filed her current Form I-821, identified as an application for re-registration or renewal of TPS, which was electronically referred to the California Service Center [WAC 05 063 70128]. On July 23, 2005, the application was denied by the CSC Director on the ground that the applicant's previous grant of TPS had been withdrawn, making her ineligible for re-registration or renewal of TPS. The applicant filed a timely appeal, arguing that she was not required to file a Form I-601 and that a waiver request had no connection to her TPS application. On May 24, 2006, the AAO dismissed the appeal on the ground that the applicant's prior TPS was properly withdrawn and, when the applicant failed to file a Form I-601 waiver request, she was ineligible to re-register for, or renew, TPS. The AAO also determined that the applicant did not provide any evidence that she was eligible for late initial TPS registration.

On December 29, 2006, counsel filed a motion to reopen, accompanied by some additional documentation, at the VSC. Though the motion refers to "Receipt No.: WAC 05 063 70128" (the application for re-registration or renewal of TPS, adjudicated by the CSC and the AAO), the motion appears to relate to the initial application adjudicated by the VSC [EAC 99 193 50256], since the substance of the motion focuses exclusively on that application and the motion was filed at the VSC, not the CSC.

A motion to reopen or reconsider must be filed within 30 days of the decision that the motion seeks to reopen or reconsider (33 days if the decision was served by mail). See 8 C.F.R. § 103.5(a)(1)(i). The official having jurisdiction is the official who made the latest decision in the proceeding. See 8 C.F.R. § 103.5(a)(1)(ii). As provided in 8 C.F.R. § 103.5(a)(4), a motion that does not meet applicable requirements shall be dismissed. If the circumstances so warrant, however, a Service officer may reopen a proceeding or reconsider a decision on his or her own motion. See 8 C.F.R. § 103.5(a)(5).

The motion to reopen filed with the VSC on December 27, 2006, was not timely filed regardless of whether it related to the VSC Director's decision to withdraw TPS (dated January 14, 2005) or the AAO Chief's decision to dismiss the appeal of the CSC Director's denial of the re-registration application (dated May 24, 2006). In

accordance with the regulation at 8 C.F.R. § 103.5(a)(1)(ii), the VSC Director forwarded the motion to the AAO, the office that made the latest decision in the proceeding.

On motion counsel asserts, contrary to the VSC Director's finding in his decision withdrawing TPS, that the applicant did file a Form I-601 waiver request with the VSC on December 24, 2003, but that it was returned to her without action by the VSC. As evidence thereof counsel submits a photocopy of the applicant's Form I-601, bearing a receipt stamp of the VSC dated December 24, 2003. In addition, counsel submits a Form I-797 notice from the VSC to the applicant, dated January 26, 2004, stating that her Form I-601 was being returned to her because it "should be filed at the local office or immigration court considering your application for adjustment of status or the American Consulate or Embassy considering your application for an immigrant visa." These instructions were incorrect since the applicant was not applying for either adjustment of status or an immigrant visa. The VSC notice cited the regulations governing the locations for filing a Form I-601, which specify at 8 C.F.R. § 212.7(b)(2)(iii) that a waiver request may be filed at "[t]he Service office having jurisdiction over the alien if the alien is in the United States." The applicant filed her Form I-601 at the correct location, counsel contends, because the VSC had jurisdiction over her pending TPS application when she filed her waiver request in December 2003. Counsel concludes that the proceeding should be reopened and that the applicant's TPS should be reinstated pending the outcome of the Form I-601 waiver application.

Based on counsel's argument and a review of the record, the AAO will grant the motion to reopen. Since the CSC is the office with original jurisdiction of the applicant's most recent TPS application, the case will be remanded for the CSC Director to rule upon the applicant's Form I-601, Application for Waiver of Grounds of Excludability. After ruling on the waiver application, the CSC Director will issue a new decision on the initial Form I-821 application, in which he will determine whether TPS should be reinstated for the applicant. When the adjudication of the initial TPS application is complete, the CSC Director shall also issue a new decision on the second application for re-registration or renewal of TPS.

As always in these proceedings, the burden of proof rests solely with the applicant. See section 291 of the Act, 8 U.S.C. § 1361.

On August 7, 2007, the AAO received a transcript of the applicant's current removal proceedings, which indicate that she has been granted voluntary departure until November 16, 2007. The transcript includes a handwritten notation of the Immigration Judge stating that the applicant has abandoned her claim of eligibility for TPS. The AAO has received no communication from the applicant, however, stating that she wishes to abandon her application for TPS and withdraw her appeal. The regulation at 8 C.F.R. § 103.3(a)(2)(ix) specifies that an applicant "may withdraw the appeal, *in writing*, before a decision is made." [Emphasis added.] In the absence of any such writing from the applicant, there is no basis for the AAO to withdraw the her appeal prior to issuing the instant decision.

**ORDER:** The motion to reopen is granted. The matter is remanded to the CSC Director for a ruling on the applicant's Form I-601, Application for Waiver of Grounds of Excludability. The director shall then enter a new decision on the initial Form I-821 application [EAC 99 193 50256], determining whether the withdrawal of TPS should be reversed and the applicant's TPS reinstated. When the adjudication of the initial application is complete, the director shall also enter a new decision on the second Form I-821 application for re-registration or renewal of TPS [WAC 05 063 70128].