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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

M,

[redacted]

FILE: [redacted] OFFICE: California Service Center DATE: DEC 18 2007

[WAC 05 092 74272 –
as it relates to WAC 99 196 51911]

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 District Director in San Antonio, Texas, withdrew the applicant's previously granted Temporary Protected Status. The Director of the California Service Center (CSC) denied the latest re-registration application, which is now on appeal before the Administrative Appeals Office (AAO). The initial application will be reopened, *sua sponte*, by the Chief, AAO. The District Director's decision will be withdrawn and the application remanded to the CSC Director for further consideration and action. The CSC Director's decision on the re-registration application will also be withdrawn and the application remanded for further consideration and action.

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 director denied the re-registration application on the ground that the applicant did not provide the final court dispositions of an arrest for alien smuggling and therefore failed to establish that she was eligible for TPS.

The director may withdraw the status of an alien granted Temporary Protected Status under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. *See* 8 C.F.R. § 244.14(a)(1).

On appeal, the applicant explains the circumstances of her arrest for alien smuggling and submits some related documentation.

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.

An alien shall not be eligible for temporary protected status under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. *See* Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

> *Felony* means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.
>
> *Misdemeanor* means a crime committed in the United States, either
> (1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
> (2) A crime treated as a misdemeanor under the term "felony" of this section.
>
> For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 244.1.

The applicant indicates that she entered the United States without inspection in 1988. She filed her first Form I-821, Application for Temporary Protected Status, with the CSC during the initial registration period for Honduran nationals on July 6, 1999 [WAC 99 196 51911]. It was approved on October 26, 2000, and the applicant maintained her TPS thereafter by filing timely re-registration applications. On September 27, 2004, the applicant was arrested by the U.S. Border Patrol near Laredo, Texas, in an automobile with three illegal aliens. On September 28, 2004, she pleaded guilty in federal district court to a charge of aiding and abetting the illegal entry of aliens and transporting them within the United States, and was sentenced to one year of probation. Following her criminal conviction, the District Director in San Antonio, Texas, withdrew the applicant's TPS on December 30, 2004, citing section 212(a)(6)(E)(i) of the Act, which provides that "[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter the United States in violation of the law is inadmissible." The district director referred to the waiver provisions [section 212(a)(6)(E)(ii) and (iii) and section 212(d)(11)] of the Act, but stated that they only apply to an applicant for adjustment of status whose smuggling activities are on behalf of his or her spouse, parent,

or child. Since the smuggling activities of the applicant in this case did not involve such core family members, the district director concluded that no waiver of inadmissibility could be granted to the applicant.

On December 31, 2004, the applicant filed a new TPS application at the CSC [WAC 05 092 74272], which she identified as a re-registration application. If the applicant is filing an application as a re-registration, a previous grant of TPS must have been afforded the applicant, as only those individuals who are granted TPS must register annually. In addition, the applicant must continue to maintain the conditions of eligibility. *See* 8 C.F.R. § 244.17.

On February 14, 2005, the CSC requested the applicant to submit a certified copy of the final court disposition of her arrest in September 2004, though it was already in the record. On May 18, 2006, the director denied the application on the ground that the applicant's response to the request for evidence did not include the final court disposition of her arrest (which was erroneous) and therefore did not establish her eligibility for TPS.

On appeal the applicant asserts that she had intended to pick up only her nephew in Laredo, Texas, after his illegal entry into the United States, and drive him to Los Angeles. Since two Mexicans unknown to the applicant were with her nephew when she arrived in Laredo, however, she allowed them to come along. Accordingly, there were three illegal aliens in the car, not just one, when she was arrested by the U.S. Border Patrol, though the applicant contends that she did not know the immigration status of the Mexicans prior to their arrest.

Upon review of the entire record, the AAO determines that the District Director erred in failing to advise the applicant of her right to file an Application for Waiver of Ground of Inadmissibility (Form I-601) before issuing a decision to withdraw her TPS. As provided in 8 C.F.R. § 244.3(b) – *Waiver of grounds of inadmissibility*:

> Except as provided in paragraph (c) of this section [relating to criminals and drug offenses, national security, and assisting in Nazi persecution], the Service may waive 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 which may be waived as set forth in this paragraph, 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.]

Since there is no record that the applicant was advised of the procedures to file a Form I-601 before her TPS was withdrawn in December 2004, the initial application will be reopened on Service motion and the District Director's decision withdrawn. The initial application will be remanded to the CSC Director for further action consistent with the above and the issuance of a new decision.

Since the decision on the re-registration application hinges on the disposition of the initial application, the CSC Director's decision on that application will also be withdrawn. The re-registration application will be remanded to the CSC Director for the issuance of a new decision once a decision has been rendered on the initial application. [1]

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[1] The applicant filed two other re-registration applications at the CSC – on June 27, 2002 and July 8, 2003. The first was approved on October 15, 2002, and the second was denied with the withdrawal of TPS on December 30, 2004.

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.

ORDER: The initial TPS application [WAC 99 196 51911] is reopened on Service motion and the District Director's decision of December 30, 2004, is withdrawn. The CSC Director's decision of May 18, 2006, on the re-registration application [WAC 05 092 74272] is also withdrawn. Both applications are remanded to the CSC Director for further action, in accordance with the above discussion, and the issuance of new decisions on the initial application and on the re-registration application.