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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

OFFICE: NEBRASKA SERVICE CENTER

DATE: DEC 26 2007

[LIN 01 201.50441]

IN RE:

Applicant:

[REDACTED]

APPLICATION:

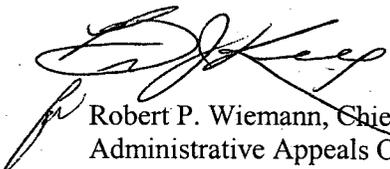
Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center (NSC). Two motions to reopen the case were subsequently dismissed by the NSC director and the District Director, St. Paul, Minnesota, respectively. The case is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the NSC director for further 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 NSC director originally denied the initial TPS application (filed during the initial registration period on May 14, 2001, under receipt number LIN 01 201 50441) based on abandonment on January 22, 2002, because the applicant had failed to respond to a request dated July 16, 2001, to submit additional evidence to establish continuous residence in the United States since February 13, 2001, and continuous physical presence from March 9, 2001, to the date of filing the application. On February 22, 2002, the applicant filed a motion to reopen the NSC director's decision and stated that he never received the director's notice. On May 31, 2002, the NSC director granted the motion, reviewed the record of proceeding including the evidence furnished on motion, and determined that the grounds for denial had not been overcome, as the evidence of record was insufficient to establish continuous residence and continuous physical presence during the requisite period.

The applicant filed a subsequent TPS application on September 18, 2002,¹ under receipt number LIN-03-028 52324, and indicated that this is his "first application to register for Temporary Protected Status." In a Notice of Intent to Deny (NOID) dated April 3, 2003, the NSC director requested that the applicant submit evidence to establish that he was eligible for late initial registration. The NSC director denied the application on June 19, 2003, after determining that the applicant, in response to the NOID, had failed to submit evidence showing that he qualified for late initial registration. The applicant appealed the director's decision to the AAO on July 17, 2003. The AAO reviewed the record of proceeding and the evidence furnished on appeal and noted that the applicant had provided no evidence to establish that he had met any of the criteria for late registration described in 8 C.F.R. § 244.2(f)(2); therefore, the AAO dismissed the appeal on July 27, 2004.

Subsequent to the AAO's dismissal of the appeal, the NSC director issued a Notice to Appear, Form I-862, and the applicant was placed in removal proceedings. As provided in 8 C.F.R. § 244.18(b), "the filing of the charging document by the Service with the Immigration Court renders inapplicable any other administrative, adjudication or review of eligibility for Temporary Protected Status. The alien shall have the right to a *de novo* determination of his or her eligibility for Temporary Protected Status in the deportation or exclusion proceedings."

On December 19, 2005, a motion to reopen the **initial** TPS application (receipt number LIN 01 201 50441) was received at the California Service Center (CSC). Counsel stated that the Immigration Judge (IJ), in a continued hearing, requested that the applicant file a motion to reopen and reconsider his initial TPS application. On December 21, 2005, the CSC director advised the applicant that his motion must be filed with the Nebraska Service Center, the office that rendered the unfavorable decision. The motion was received at the NSC on January 5, 2006. On March 9, 2006, the NSC forwarded the motion to the

¹ It is noted that counsel, in his appeal dated July 17, 2003, stated that the applicant filed his "second initial application" on June 14, 2002 (during the initial registration period). The record, however, indicates that although the applicant signed and dated his second application on June 14, 2002, the application was received at the Nebraska Service Center on September 18, 2002, after the initial registration period had closed.

Immigration and Custom Enforcement District Counsel, Bloomington, Minnesota, after determining that the motion was under the jurisdiction of the IJ because the applicant had a scheduled Master Hearing before the IJ and the Notice to Appear remained pending. On May 31, 2006, the IJ terminated removal proceedings, without prejudice. On July 5, 2006, the District Director, St. Paul, Minnesota, denied the motion after determining that the applicant had previously filed a motion to reopen the initial application which was denied on May 31, 2002, that the applicant had been placed in removal proceedings and it was suggested by the IJ that the applicant file a new motion to reopen/reconsider regarding the initial application, but that to date, the USCIS had not received any evidence which would show that at the time the applicant filed the initial application, he was eligible to obtain TPS status.

On July 24, 2006, counsel appealed the district director's decision to deny the application. Counsel asserts that the district director does not have jurisdiction to adjudicate the applicant's motion to reopen the initial 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). 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).

A field office decision made as a result of a motion may be appealed to the AAO only if the original decision was appealable to the AAO. 8 C.F.R. § 103.5(a).

Counsel is correct in his assertion, on appeal, that the district director does not have jurisdiction over the motion to reopen the initial TPS application. The district director accepted the applicant's appeal and forwarded the case to the AAO. However, as the initial decision by the NSC director was based on abandonment, the AAO has no jurisdiction over an appeal filed based on a decision made as a result of a motion. Therefore, the case will be remanded to the NSC director and the director shall consider the applicant's response as a motion to reopen.

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 case is remanded to the director for further action consistent with the above and entry of a decision.