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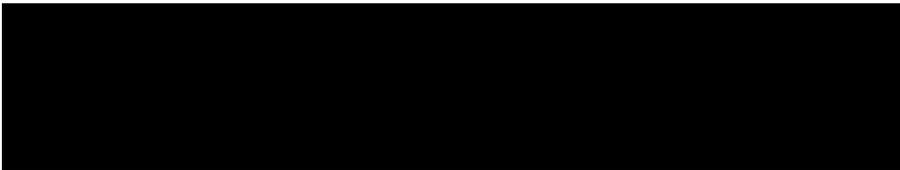
Applicant:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The applicant appealed the decision of the AAO. A motion to reopen, rather than an appeal, is the proper forum in this case, pursuant to 8 C.F.R. § 103.5(a)(1)(i). The appeal, therefore, will be treated as a motion to reopen. The motion will be dismissed, and the previous decision of the AAO will be affirmed.

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 director denied the application on July 28, 2004, because the applicant had failed to establish that he had continuously resided in the United States since February 13, 2001, and had been continuously physically present from March 9, 2001, to the date of filing the application.

The applicant appealed the director's decision to the AAO on August 30, 2004. The AAO reviewed the record and noted that the applicant resubmitted copies of statements from individuals that were previously furnished, that the statements were not notarized or attested to under penalty of perjury, and that the statements were not supported by any other corroborative evidence although the director listed on the notice of intent to deny the acceptable evidence the applicant could submit to establish eligibility. The AAO, therefore, affirmed the director's decision and dismissed the appeal on May 9, 2006.

On motion, counsel requests reconsideration of the application and submits additional evidence, including evidence previously furnished.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided at the reopened proceedings and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Based on the plain meaning of "new," a new fact is held to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing" 8 C.F.R. § 3.2 (1999). In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992); *INS v. Abudu*, 485 U.S. 94, 100 (1988). In federal criminal proceedings, a motion for a new trial based on newly discovered evidence "may not be granted unless... the facts discovered are of such nature that they will probably change the result if a new trial is granted, . . . they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and . . . they are not merely cumulative or impeaching." *Matter of Coelho*, 20 I&N Dec. 464, 472 n.4 (BIA 1992)(quoting *Taylor v. Illinois*, 484 U.S. 400, 414 n.18 (1988)).

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY* 792 (1984) (emphasis in original).

On motion, counsel submits statements from individuals who claim that the applicant was residing in the United States since February 2, 2001. He also submits copies of receipts, pay statements, and Forms 1040, Income Tax Return, dated after the requisite period required to establish continuous residence and continuous physical presence. A review of this evidence submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. Also, these statements, without supporting documentary evidence, do not establish the applicant's eligibility for the benefit sought. For these reasons, the motion may not be granted.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty, supra* at 323 (citing *INS v. Abudu, 485 U.S. at 107-108*). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu, supra* at 110.

Accordingly, the motion will be dismissed, and the previous decision of the AAO will be affirmed.

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 motion is dismissed. The decision of the AAO dated May 9, 2006, is affirmed.