



U.S. Citizenship  
and Immigration  
Services

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ML

FILE: [REDACTED]  
[SPM 04 360 00088]

Office: ST. PAUL, MINNESOTA

Date: NOV 13 2007

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.

*John H. Vaughan*  
for

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The applicant, who claims to be a native and citizen of Somalia, seeks Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The district director denied the application on the grounds that the applicant had filed a frivolous asylum application and that the applicant failed to establish her identity and nationality.

On appeal, counsel for the applicant asserts that the applicant did not file a frivolous asylum claim and that she has established that she is a native and citizen of Somalia. Counsel submits affidavits concerning the applicant's Somali identity.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 § 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
  - (1) Registers for TPS 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.

- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of condition described in paragraph (f)(2) of this section.

The burden of proof is on the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

The record reflects that the applicant initially gained admission to the United States on February 22, 1998, at Washington, District of Columbia, by presenting the passport and nonimmigrant visitor for pleasure (B-2) visa that had been issued to another alien, [REDACTED]. Shortly after being admitted to the United States, the applicant traveled to Canada, where she applied for asylum and was denied. She was returned to the United States on March 13, 2000, and was put in removal proceedings. She applied for asylum, and in the alternative, voluntary departure, before an Immigration Judge (IJ) in Buffalo, New York. The IJ found the applicant not credible, and denied the applicant's asylum claim on May 19, 2003. The IJ also denied the applicant's request for voluntary departure on the ground that the applicant appeared to have made either a false, fraudulent, or frivolous asylum claim. The IJ's decision was affirmed by the Board of Immigration Appeals (BIA) on August 18, 2004.

The applicant filed her initial Form I-821, Application for Temporary Protected Status, on September 16, 2004. In a decision dated February 6, 2006, the district director found that the applicant had filed a frivolous asylum application, concluded that she was ineligible for any benefit under the Act pursuant to 8 C.F.R. § 208.20, and denied her TPS application. The district director based this determination on remarks made by the IJ during his oral decision found in the hearing transcripts: first, where the IJ stated that the applicant admitted to being a native of Ethiopia at her Master Calendar hearing on November 13, 2000; and second, where the IJ denied the applicant voluntary departure based on the fact that "the respondent appears to have made either a false, fraudulent or frivolous I-589."

Additionally, the district director determined that the applicant had failed to establish her identity. It appears the district director based this finding on the IJ's decision, as no other reason was provided.

On appeal, counsel asserts that the IJ did not make a clear finding of frivolousness, that the IJ did not support this finding, and that the applicant was not provided an opportunity for rebuttal. Counsel further asserts that the applicant is statutorily eligible for TPS.

The first issue in this proceeding is whether the applicant filed a frivolous asylum claim.

8 C.F.R. § 208.20 provides specific instruction for determining if an asylum application is frivolous:

For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act [which makes aliens who file frivolous asylum applications permanently ineligible for benefits under the Act] only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

The record reflects that the original Notice to Appear (NTA) at the Master Calendar hearing referred to in the district director's decision alleged that the applicant was a native of Ethiopia and a citizen of Somalia. That specific factual allegation was later amended in an NTA dated September 3, 2002, and signed by Assistant District Counsel in Buffalo, New York. On September 3, 2002, the Assistant District Counsel served the amended NTA to the Immigration Court and the applicant's lawyer. The original NTA was amended to read that the applicant was a native and citizen of Somalia. The applicant's lawyer at that time admitted to the amended factual allegation and the IJ received the amended NTA into evidence.

In his Order, dated May 19, 2003, the IJ specifically checked five boxes: 1) denying the applicant's application for asylum; 2) denying her application for withholding of removal; 3) denying her relief under the Torture Convention; 4) ordering her removed from the United States to Somalia; and, 5) denying her request for voluntary departure. The box for filing a frivolous asylum application after proper notice was not checked.

The record also reflects that the IJ denied the applicant's asylum application based on a negative credibility finding, not on a finding of frivolousness. The distinction between the two is significant. On the one hand, the IJ's negative credibility finding was based on inconsistencies between the applicant's oral testimony and her written application, such that she did not meet her burden to show that she had been persecuted or had a well-founded fear of persecution on account of one of the five grounds. On the other hand, a determination of frivolousness requires the IJ's final order to specifically find that the applicant had knowingly filed a frivolous application and clearly fabricated material elements of her application after proper notice.

In a finding separate and distinct from his assessment of the merits of applicant's asylum claim, the IJ denied the applicant voluntary departure "based upon the fact that the [applicant] appears to have made either a false, fraudulent or frivolous I-589." This statement is made in reference to the applicant's eligibility for voluntary

departure, not to the merits of her asylum claim. In addition, the IJ did not make a specific finding that the applicant deliberately fabricated material elements of her claim. Therefore, the IJ did not make a legal conclusion that the applicant filed a frivolous application making her ineligible for any benefit under the Act, including TPS, under 8 C.F.R. § 208.20.

It is concluded that the applicant has not been found to have made a frivolous asylum claim and is not precluded from TPS eligibility on that basis.

The second issue to be examined is how the applicant's manner of entry into the United States affects her eligibility for TPS.

Section 212(a)(6)(C)(i) of the Act states that:

(i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Regarding the applicant's 1998 entry, under the TPS regulations at 8 C.F.R. § 244.3(b), an alien who is inadmissible on grounds that may be waived, including the ground identified under section 212(a)(6)(C)(i) of the Act, must be advised of the procedures for applying for a waiver of grounds of inadmissibility on a Form I-601, Application for Waiver of Ground of Excludability. Further, that waiver application must be properly filed and approved before eligibility for TPS can be considered.

Pursuant to 8 C.F.R. § 244.3(b):

Except as provided in paragraph (c) of this section, 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).

In this case, the director failed to provide the applicant with an opportunity to file a Form I-601. Therefore, the director shall provide the applicant with an opportunity to submit a Form I-601, and shall also allow the applicant to submit sufficient evidence to otherwise establish eligibility.

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.