

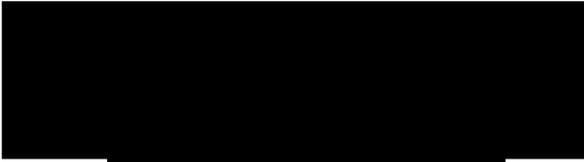
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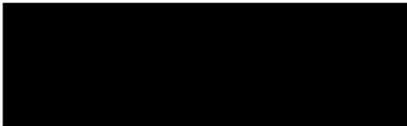
FILE: [REDACTED]
[EAC 04 026 51806]

Office: Vermont Service Center Date: NOV 16 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:



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 Chief, Administrative Appeals Office. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The case will be reopened and the appeal will again be dismissed.

The applicant claims to be a 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 because the applicant had failed to demonstrate he was eligible for late registration, and because the applicant was ineligible for TPS due to two misdemeanor convictions in the United States. The director also concluded that the applicant was ineligible due to at least two misdemeanor convictions in the United States.

A subsequent appeal from the director's decision was dismissed on December 27, 2006, after the Chief of the AAO also concluded that the applicant had failed to establish that he was eligible for late registration. On motion to reopen, the applicant reasserts his claim of eligibility for TPS and submits evidence in support of the motion.

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 designated by the Attorney General 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.
- (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 conditions described in paragraph (f)(2) of this section.

The phrase continuously physically present, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

The phrase continuously resided, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

Persons applying for TPS offered to El Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. Subsequent extensions of the TPS designation have been granted, with the latest extension valid until September 9, 2007, upon the applicant's re-registration during the requisite time period.

The initial registration period for Salvadorans was from March 9, 2001, through September 9, 2002. The record reveals that the applicant filed this application with Citizenship and Immigration Services (CIS) on November 5, 2003. To qualify for late registration, the applicant must provide evidence that during the initial registration period he fell within at least one of the provisions described in 8 C.F.R. § 244.2(f)(2) above.

The burden of proof is upon 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 first issue in this proceeding is whether the applicant is eligible for late registration.

The record of proceedings confirms that the applicant filed this application after the initial registration period had closed. To qualify for late registration, the applicant must provide evidence that during the initial registration period he fell within at least one of the provisions described in 8 C.F.R. § 244.2(f)(2) above.

On May 25, 2004, the applicant was requested to submit evidence establishing his eligibility for late registration as set forth in 8 C.F.R. § 244.2(f)(2). The applicant was also requested to submit evidence establishing his qualifying continuous residence and continuous physical presence in the United States. The applicant, in response, provided documentation relating to his residence and physical presence in the United States.

The director determined that the applicant had failed to establish he was eligible for late registration and denied the application on November 17, 2004. On appeal, counsel for the applicant refers to an I-797, and asserts that the statement made on the I-797 as granting a motion to re-open the applicant's original filing for TPS, which was denied due to abandonment.

The I-797 is not intended to operate as a legal finding in any case, and is merely informational in purpose. In this case the I-797 clearly states that it is reference to the applicant's Application for Temporary Protected Status, not a motion to reopen as the counsel misrepresented in her brief. There is no evidence that the applicant filed a Motion to Reopen during that time. Further, the copy provided by the applicant contains an internal post-it note referring to the form as being a receipt for the "TPS filing." The notice was issued in response to the applicant's filing of an I-821 on November 5, 2003, which was incorrectly marked as a re-registration. Thus, CIS issued the receipt notice "as it related" to EAC 02-032-54729, but subsequently issued the decisions based on review of the I-821 as a late initial filing because the applicant was not eligible to file a re-registration. The AAO finds counsel's attempt to interpret this user generated receipt to be out of context and without merit.

The applicant has not submitted any evidence to establish that he has met any of the criteria for late registration described in 8 C.F.R. § 244.2(f)(2). Consequently, the Chief's conclusion that the applicant had failed to establish his eligibility for late registration will be affirmed.

The next issue in this matter is the applicant's ineligibility due to two misdemeanor convictions in the United States. 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.

The record reveals the following offenses:

1. On October 17, 2002, the applicant was convicted of Disorderly Conduct, Section 240.20 NYPL, by the First District Court of Suffolk County, New York. Case No. [REDACTED]
2. On October 17, 2002, the applicant was convicted of Driving While Ability Impaired, Section 1192.1 NYPL, by the First District Court of Suffolk County, NY. Case No. [REDACTED]

On appeal counsel acknowledges the AAO's position, and then states that the Chief Counsel's Office for Immigration and Customs Enforcement agrees with her interpretation of the pertinent regulations.

Counsel's position is not persuasive. The statute and regulations are clear on this issue, and counsel has not provided any precedent or binding authority to support her position. Further, the authority to adjudicate TPS appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

As stated in the AAO's previous decision, immigration benefits are a matter of federal law, and a state's classification or topology is irrelevant for federal immigration proceedings. These proceedings are under AAO jurisdiction, thus, counsel's assertions are without merit and incorrect as a matter of law. The AAO would further note that the applicant failed to reveal his convictions on his form I-821, a deliberate misrepresentation which renders the applicant inadmissible under section 212(a)(6)(c) of the Act.

The applicant has been convicted of two or more misdemeanors, detailed above, consequently, the director's decision to deny the application for this reason will be affirmed.

The final issue in this matter is the applicant's nationality.

Section 8 C.F.R. § 244.9 requires applicant's to submit all information requested in the instructions of the forms and as may be requested by CIS. It also provides that acceptable evidence of nationality are:

- (i) Passport;
- (ii) Birth Certificate accompanied by photo identification; and/or
- (iii) Any national identity document from the alien's country of origin bearing a photo and/or fingerprint.

In this case the applicant submitted only a birth certificate, and the Chief's decision was based on the record at the time of the decision. Thus, counsel has failed to show that the decision was incorrect as a matter of law based on the record at the time of the decision, 8 C.F.R. § 103.3, however as the AAO reviews cases on a de novo basis the applicant's passport submitted on appeal will be accepted and that portion of the chief's decision will be withdrawn.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. An alien applying for TPS has the burden of proving that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden.

ORDER: The motion to reopen is dismissed. The previous decision of the AAO dated December 12, 2006, is affirmed.