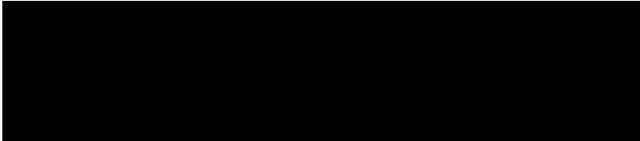




U.S. Citizenship
and Immigration
Services

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FILE:



Office: California Service Center

Date:

FEB 14 2008

incorporated therein

[WAC 05 193 71030]

IN RE:

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the California Service Center. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The initial application was denied by the Director, California Service Center, and is currently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is stated 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 record reveals that the applicant filed an initial TPS application on February 4, 2002, under CIS receipt number SRC 02 097 53877. The Director, Texas Service Center, denied that application on April 26, 2004, because the applicant failed to submit final court dispositions for two arrests as requested by the director in a December 30, 2003, notice of intent to deny. The record does not reflect that the applicant filed an appeal.

The applicant filed the current Form I-821, Application for Temporary Protected Status, on April 11, 2005, under CIS receipt number WAC 05 193 71030, and indicated that he was re-registering for TPS. The Director, California Service Center, denied the application on September 29, 2005, because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS.

On appeal, the applicant reasserts his eligibility for TPS, and states that his lawyer did not give him the December 30, 2003 notice of intent to deny, which had been mailed to his lawyer, until January 2005. The applicant states further that the charges relating to the two arrests referred to in the notice of intent to deny had been dismissed. With his appeal, the applicant submits court disposition records which indicate that the charges were dismissed.

In effect the applicant alleges ineffective assistance of his prior counsel. The applicant alleges that his prior counsel failed to timely provide him with a copy of the December 30, 2003 notice of intent to deny, and failed to timely submit the requested court dispositions, to the applicant's detriment. However, the applicant does not submit any of the required documentation to support an appeal based on ineffective assistance of counsel.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Furthermore, CIS is not responsible for inaction of the applicant's representative.

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. 8 C.F.R. § 244.17.

In this case, the applicant has not previously been granted TPS. Therefore, he is not eligible to re-register for TPS. Consequently, the director's decision to deny the application will be affirmed.

Beyond the decision of the director, the applicant has not submitted sufficient evidence to establish his nationality and identity. Although the record of proceedings contains an El Salvador birth certificate (in Spanish), with an English translation, it was not accompanied by a national identity document from his country bearing a photograph and or/fingerprint. The birth certificate alone is insufficient to establish the applicant's identity and nationality under the provision of 8 C.F.R. § 244.9(a)(1). Therefore, the application must be denied for these reasons.

In addition, the applicant does not meet the eligibility requirements of being a national of a state designated under section 244(b) of the Act. The record reveals that the applicant was placed in proceedings on October 7, 1996, at which time he indicated that he was a native and citizen of Guatemala. The applicant has failed to provide reliable documentation to reconcile the discrepancies in the record pertaining to his claimed citizenship.

Section 244(c) of the Act, and the related regulations at 8 C.F.R. § 244.2(a), provide that an applicant is eligible for temporary protected status only if such alien establishes that he or she:

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;....

Pursuant to section 244(c) of the Act, an alien who is a national of a foreign state designated under subsection (b) of this section (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets the requirements of subsection (c) of this section, may be granted TPS in the United States. Further, 8 C.F.R. § provides that an alien who 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, may, in the discretion of the director, be granted TPS. Section 101(a)(21) of the Act defines the term "national" to mean a person owning permanent allegiance to a state.

In *Chee Kin Jang v. Reno*, 113 F. 3d 1074 (9th Cir. 1997), the United States Court of Appeals found that the Service reasonably interpreted the term "PRC national" in the Chinese Student Protection Act (CSPA) to exclude Chinese dual nationals who did not declare citizenship of the People's Republic of China (PRC) when they entered the United States, and that the Service's treatment of PRC dual nationals, depending on whether they entered under a PRC passport or a passport of a different country, was reasonable. The Court states that an alien is bound by the nationality claimed or established at the time of entry for the duration of his or her stay in the United States. Thus, a dual national CSPA principal applicant must have claimed PRC nationality at the time of his or her last entry into the United States.

In *Chevron USA, Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 842-843 & n.9 (1984), the district court held that the practice of binding an alien to his claimed nationality "promotes the congressional policy of insuring that an alien will be able to return, voluntarily or otherwise, to his or her country of origin if requested to do so and provides for consistency in the enforcement of law, especially given the large numbers of nonimmigrant foreign nationals who visit the United States each year."

In addition, the Board of Immigration Appeals, in *Matter of Ognibene*, 18 I&N Dec. 425 (BIA 1983), concluded that although an alien may hold the phenomenon of dual nationality, an alien may only claim one citizenship at a time for purposes of immigration matters within the United States. As explained in *Ognibene*, clearly, it is not the

prerogative or position of the United States to require a dual national alien nonimmigrant to elect to retain one or another of his nationalities. Equally as clear, the national sovereignty of the United States is acceptably and reasonably exercised through section 214 of the Act in holding that a dual national alien nonimmigrant is, for the duration of his temporary stay in the United States, of the nationality which he claimed or established at the time that he entered the United States.

The Board, in *Ognibene*, further held that under appropriate circumstances in a given proceeding of law, the operative nationality of a dual national may be determined by his conduct without affording him the opportunity to elect which of his nationalities he will exercise. The General Counsel, in GENCO Op. 84-22 (July 13, 1984), reinforced this concept and states, "In interpreting a law which turns on nationality, the individual's conduct with regard to a particular nation may be examined. An individual's conduct determines his 'operative nationality.' The 'operative nationality' is determined by allowing the individual to elect which nationality to exercise. The nationality claimed or established by the nonimmigrant alien when he enters the United States must be regarded as his sole nationality for the duration of his stay in the United States." [Emphasis in original].

Additionally, the General Counsel, in GENCO Op. 92-34 (August 7, 1992), concluded that the Service may, in the exercise of discretion, deny TPS in the case of an alien who, although a national of a foreign state designated for TPS, is also a national of another foreign state that has not been designated for TPS. The General Counsel explains that "TPS is not a provision designated to create a general right to remain in the United States. Rather, the statute provides a regularized means of granting haven to aliens who, because of extraordinary and temporary circumstances, cannot return to their home country in safety. See id. 244A(b)(1)(A), (B), and (C), 8 U.S.C. § 1254(b)(1)(a), (b), and (c)."

While the applicant, in this case, claims that he entered the United States without inspection, as indicated above, the record indicates that the applicant claimed to be a native and citizen of Guatemala when he was placed in deportation proceedings on October 7, 1996. The applicant claimed to be a national and citizen of Guatemala throughout these immigration proceedings. However, the applicant stated on his Form I-821, Application for Temporary Protected Status, filed on February 4, 2002, and his subsequent re-registration application, that he was born in El Salvador. In support of his application, the applicant submitted a copy of his birth certificate, with English translation, reflecting that he was born in El Salvador. It is also noted, however, that the English translation of the birth certificate is questionable. Specifically, although the birth certificate indicates that the applicant's father is domiciled in Guatemala, and is a native of Guatemala, the translation omits that information. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The applicant has failed to submit any objective evidence to explain or justify the discrepancies in his birth certificate and the English translation. Therefore, the reliability of this evidence offered by the applicant is suspect.

There is no evidence of record to establish that the applicant is not a citizen of Guatemala. As noted above, that while the applicant first claimed to be a Guatemalan citizen, he now presents an El Salvadoran birth certificate and claims to be a citizen of El Salvador by virtue of his birth in El Salvador; however, he has not submitted any

reliable documentation to establish that he is not a citizen of Guatemala. The nationality the applicant claimed and/or established at the time he first came into contact with CIS was that of Guatemalan. Therefore, this citizenship must be regarded as his operative nationality during these proceedings.

Guatemala is not a designated foreign state under Section 244 of the Act. The applicant, therefore, does not meet the eligibility requirements of being a national of a state designated under section 244(b) of the Act. As the applicant has not demonstrated that his "operative nationality" is that of a TPS-designated country, for this reason, the director's decision to deny the application will be affirmed, as a matter of discretion.

As noted above, the applicant was placed in proceedings on October 7, 1996, and was ordered deported, *in absentia*, on March 26, 1997, to Guatemala by an immigration judge.

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 appeal is dismissed.