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FILE:



Office: VERMONT SERVICE CENTER

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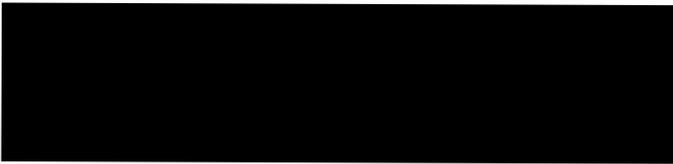
Applicant:



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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who is applying for 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 failed to establish she was eligible for late registration.

On appeal, counsel, on behalf of the applicant, asserts the applicant's claim of eligibility for TPS and submits some evidence in support of her claim.

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, 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 section 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 conditions described in paragraph (f)(2) of this section.

The initial registration period for Nicaraguans was from January 5, 1999, through August 20, 1999. The record reveals that the applicant filed her application with Citizenship and Immigration Services (CIS), on December 17, 2007, after the initial registration period had closed.

To qualify for late registration, the applicant must provide evidence that during the initial registration period he or she 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 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).

On July 17, 2007, the applicant was requested to submit evidence to establish her eligibility for late registration as set forth in 8 C.F.R. § 244.2(f)(2). In response, the applicant submitted some evidence to establish her qualifying continuous residence and continuous physical presence in the United States; however, the applicant did not submit evidence to establish her eligibility for TPS late registration. Therefore, the director denied the application on September 5, 2008.

On appeal, the applicant states that she is eligible for TPS late registration because she had an adjustment of status application pending before CIS from 1999 to 2004. She also claims that she had attempted to file a TPS application, but her former [REDACTED] failed to do so.

In addition, on appeal, counsel asserts that the applicant was prejudiced by prior counsel's failure to file a TPS application in a timely manner (i.e., within the 60-day time frame), and his failure to provide evidence to establish her eligibility for late initial TPS registration.

Counsel claims that the applicant's former counsel did not inform her of the requirement to file her TPS application within the prescribed time period. Counsel further argues that the applicant has complied with all of the requirements to establish an ineffective assistance of counsel claim under *Matter of Lozada*, including a letter to her former [REDACTED] a, and a complaint to the California State Bar.

As set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), an alien is required to submit: 1) an affidavit attesting to the relevant facts, detailing the agreement that was entered into, what actions were supposed to be taken and what the attorney did or did not do; 2) evidence that former counsel was informed of the allegations, given an opportunity to respond and former counsel's response, if any; and 3) evidence that a complaint has been filed with the appropriate disciplinary authorities regarding such representation or an explanation of why such a complaint was not filed. *Id.* at 638-39¹.

The applicant has failed to submit evidence confirming that her former counsel has been notified of the incompetency claim. Although she submits a copy of a letter to [REDACTED] dated October 3, 2008, there is no evidence that he actually had received this letter. To the extent that the applicant has failed to produce evidence sufficient to substantiate an ineffective assistance of counsel claim, the AAO will review the record applying standard statutory and regulatory eligibility requirements and burdens of proof. It is worth noting that the applicant claims in her statement that she had maintained contact with her former attorney even after she had moved to Nevada in 2005, and continued to communicate with him until August 2008.

A review of the record shows that the applicant filed an application for adjustment of status under the provisions of NACARA on November 30, 1999. That application was denied on May 9, 2002. On July 12, 2002, the applicant filed a motion to reopen the decision. On March 11, 2004, her application for adjustment of status was denied again. The regulations require that a late registration for TPS be filed within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section. 8 C.F.R. § 244.2(g). In this case, the application for TPS was filed on December 17, 2007, more than three years after her application for adjustment of status was denied. The applicant has failed to establish her eligibility for late

¹ On January 7, 2009 the Attorney General issued a precedent decision relating to ineffective assistance of counsel, superseding *Matter of Lozada*. See *Matter of Compean*, et al., 24 I&N Dec. 710 (A.G. 2009). In *Compean*, the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* at 711-27. Although the Act and regulations also do not afford aliens a right to effective assistance of counsel, USCIS may, in its discretion, reopen proceedings based on the deficient performance of an alien's prior attorney. *Id.* at 727. *Compean* establishes three elements of proof and six documentary requirements that an alien must meet to prevail on a claim of deficient performance of counsel. *Id.* Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

Despite this change, the AAO will evaluate this appeal under *Matter of Lozada*, the administrative precedent that was applied by the director and argued by counsel on appeal. Under general rules of legal construction, a substantive, non-curative, adverse change in administrative rules is not to be applied retroactively unless the language of both the administrative rule and the statute authorizing the rule requires such a result. *Uzuegbu v. Caplinger*, 745 F.Supp. 1200, 1215 (E.D. La. 1990).

registration under 8 C.F.R. § 244.2(f)(2) and (g). Consequently, the director's conclusion that the applicant failed to establish her eligibility for TPS late registration will be affirmed.

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.