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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: SEP 14 2009
[EAC 02 286 50024] *consolidated therein*

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 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 initial application for Temporary Protected Status and a re-registration application were denied by the Director, Vermont Service Center. The AAO dismissed the applicant's appeal and rejected a subsequent motion as untimely filed. Upon consideration by the AAO, and in accordance with 8 C.F.R. § 103.5(a) the previous decisions of the AAO dated January 6, 2006 and August 5, 2008 are reopened for review upon Service Motion. The applicant's appeal will be sustained and the case remanded to the director for further action.

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 applicant filed an initial Form I-821, Application for Temporary Protected Status, under receipt number EAC 01 193 53707 on May 7, 2001, during the initial registration period for citizens of El Salvador. The director denied the application on April 1, 2003, after determining that the applicant had abandoned her application by failing to respond to an April 2, 2002, request for evidence. Pursuant to 8 C.F.R. § 103.2, a denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen under 8 C.F.R. § 103.5. The applicant's former counsel filed a motion to reopen under receipt EAC 03 162 52996 on May 2, 2003. The untimely motion was dismissed by the director on July 31, 2003.

The applicant filed a second application for TPS on September 9, 2002, under receipt EAC 02 286 50024. The applicant indicated on this Form I-821 application that she was re-registering for TPS. The director denied the re-registration application because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS.

On December 20, 2003, the applicant appealed the director's decision. The applicant provided a new mailing address and submitted copies of documentation that she stated had previously been provided to USCIS as well as new evidence in support of her claim of eligibility for TPS.

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 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.

Persons applying for TPS offered to Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States from March 9, 2001 until the date the TPS application is filed. A subsequent extension of the TPS designation has been granted with validity until September 9, 2010, 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.

As previously stated, the record reveals that the applicant filed her initial TPS application on May 7, 2001. That application was denied for abandonment and a subsequent untimely motion was dismissed by the director.

The applicant filed a second TPS application on September 9, 2002. While the applicant indicated on the second Form I-821 that it was a TPS re-registration, the application was filed within the initial registration period for Salvadorans.

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.

The director denied the second TPS application 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 of the director's November 19, 2003 decision, the applicant stated that she did not understand why her TPS application had been denied and asserted that correspondence pertaining to her application

had been sent to her former counsel even though she had notified U.S. Citizenship and Immigration Services (USCIS) that she was no longer represented by that firm. The applicant submitted additional evidence and documentation that had previously been provided.

In a January 6, 2006 decision, the AAO stated that the director had denied the application because the applicant's initial application had been denied and the applicant was not eligible for re-registration. While the AAO noted that the director did not "explore the possibility that the applicant was attempting to file a new application, rather than a re-registration" the AAO did not make a determination as to whether or not the applicant's second application had been timely filed. The AAO determined that the applicant had failed to establish her continuous residence and continuous physical presence during the requisite periods and dismissed the applicant's appeal. Upon review, the AAO finds that the TPS application filed under receipt number EAC 02 286 50024 was filed within the initial application period and should have been considered as a timely-filed application. Consequently, both the director's November 19, 2003 decision and the AAO's January 6, 2006 decision are withdrawn.¹

The remaining issue in this proceeding is whether the applicant has established her continuous residence in the United States since February 13, 2001, and her continuous physical presence in the United States since March 9, 2001.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The applicant initially submitted evidence for the years 1999 and 2000 which need not be addressed in this proceeding. The applicant subsequently submitted evidence including employment letters, correspondence from the Social Security Administration, receipts, utility bills, copies of automobile insurance policies, a New York State identification card, and a New York State Learner Permit, as well as additional documentation pertaining to the requisite periods for Salvadoran TPS applicants.

Upon review it is determined the above documentation as well as other evidence in the record serve as sufficient evidence to establish that the applicant has met the continuous residence and continuous physical presence requirements described in 8 C.F.R. §§ 244.2(b) and (c). There are no other known grounds of ineligibility; however, the validity period of the applicant's fingerprint check has expired.

¹ It is noted that, pursuant to 8 C.F.R. § 103.5(b), the AAO may *sua sponte* reopen and reconsider any adverse decision. Upon review it is determined that a decision by the director on January 29, 2007 decision pertained to the denial of a Form I-765, Application for Employment Authorization. The AAO has no jurisdiction over applications for Employment Authorization. The director erroneously accepted the applicant's response as an appeal instead of a motion to reopen and forwarded the file to the AAO. The AAO should have remanded the case for the director to consider the applicant's response as a motion to reopen; however, this is moot as the applicant's appeal is being sustained and the applicant will be eligible for employment authorization under 8 C.F.R. § 274a.2(a)(12). The decision of the AAO dated August 5, 2008 rejecting the motion as untimely is hereby withdrawn.

Accordingly, the case is remanded for the purpose of sending the applicant a fingerprint notification form, scheduling her for fingerprinting, and affording her the opportunity to comply with its requirements.

An alien applying for temporary protected status 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 met this burden.

ORDER: The appeal is sustained and the case remanded for further action.