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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 2 9 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the California Service Center. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the California Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant claims to be a citizen of Haiti 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 previously filed a frivolous asylum application and, therefore, he is permanently ineligible for any benefit under section 244 of the Act.

On appeal, counsel argues that the Board of Immigration Appeals "rendered a lazy generalized decision." Counsel asserts there has never been a finding that "the Board is satisfied that the applicant, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." Counsel asserts that during the removal proceedings, the applicant "was never issued the frivolous warning instructing him about the consequences of filing/presenting a frivolous claim for asylum."

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 as designated by the Attorney General, now the Secretary, Department of Homeland Security (Secretary), 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 Secretary 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.

Section 208(d) of the Act states, in pertinent part:

(4) Notice of privilege of counsel and consequences of frivolous application. – At the time of filing an application for asylum, the Secretary shall –

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(6) Frivolous application – If the Secretary determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

The regulation at 8 C.F.R. § 208.20 provides:

For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of 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 a Form I-862, Notice to Appear, was served on the applicant on June 19, 2000. The applicant's Form I-589, Application for Asylum and Withholding of Deportation, was filed on January 4, 2001. The Form I-589 advised the applicant that if it is determined that he knowingly filed a frivolous application for asylum, he would be permanently ineligible for any benefits under the Act. On the same date, the applicant's representative/attorney was notified by personal service of the privilege of counsel and consequences of knowingly filing a frivolous asylum application pursuant to section 208(d)((4) of the Act. The notice advised the applicant that if he knowingly filed a frivolous application for asylum, he would be barred forever from receiving any benefits under the Act.

The transcript of hearing indicates that during his removal proceedings on January 4, 2001,[1] the applicant was again advised by the immigration judge of the consequences of knowingly filing a frivolous asylum application.

On April 23, 2001, a removal hearing was held and the applicant's asylum application was denied and he was ordered removed from the United States. The oral decision of the immigration judge (IJ) indicates that the court found the applicant to have filed a frivolous application for asylum and, therefore, he was permanently barred from receiving any benefits under the Act. The applicant appealed the IJ's decision to the Board of Immigration Appeals (BIA). On August 28, 2002, the BIA affirmed, without opinion, the IJ's decision.

The director determined that the applicant was ineligible for TPS benefits and denied the application on June 8, 2010.

Counsel cannot collaterally attack the decision of the BIA before the AAO. The BIA is the appropriate forum, and the applicant has the opportunity on motion to the BIA to dispute those findings. It is noted that counsel represented the applicant during the removal proceedings and no motion was filed before the BIA.

Counsel's statements on appeal have been considered. The AAO, however, is bound by the clear language of the statute and lacks the authority to change the statute. There is no waiver available, even for humanitarian reasons, due to the applicant's ineligibility pursuant to section 208(d)(6) of the Act. Consequently, the director's decision to deny the TPS application on this ground 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.

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[1] The removal proceedings were continued on April 23, 2001.