

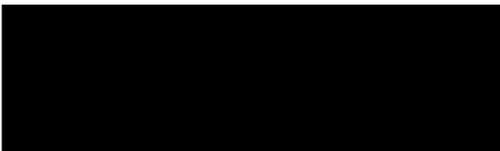
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



M₁

DATE: Office: NEBRASKA SERVICE CENTER

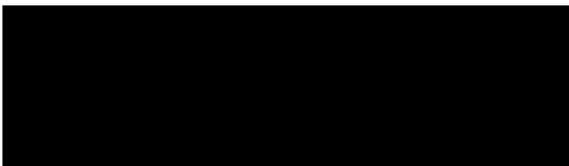
APR 27 2011

FILE: [REDACTED]
[WAC 10 900 66902]

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:

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 Nebraska 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 Nebraska Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. 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, Nebraska 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 asserts, “[t]he same standard of not barring someone from applying for withholding of removal despite the determination that a frivolous asylum application was filed should be applied in the case of Temporary Protected Status where the potential for suffering may be even worse than in a withholding of removal scenario.” Counsel submits a statement from the applicant, who indicated that his former attorney made an error on his asylum application. The applicant requests that his TPS application be reconsidered.

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.

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 issued and served on the applicant on May 22, 2001. On January 31, 2002, the applicant and his former attorney were 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. At the time of his removal proceedings on January 31, 2002,¹ the applicant was also given verbal notification by the immigration judge (IJ) of the consequences of knowingly filing a frivolous asylum application.

The applicant's Form I-589, Application for Asylum and Withholding of Deportation, was filed on May 2, 2002. 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 October 23, 2002, 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

¹ The proceedings were subsequently continued.

under the Act. The applicant appealed the IJ's decision to the Board of Immigration Appeals (BIA). On June 2, 2006, the BIA, affirmed, without opinion, the IJ's decision. The applicant filed a motion before the BIA. On September 8, 2006, the BIA denied the motion.

The director determined that the applicant was ineligible for TPS benefits and denied the application on September 28, 2010.

On appeal, the applicant asserts that subsequent to filing his appeal, he was informed by his former counsel "that the judge made the decision and denied my case without giving me the chance to defend myself." The applicant asserts, "I ask for you to either open my case or listen to the tapes of what happened in court."

The record reflects that on January 30, 2004, the BIA returned the record to the immigration court for further action.² The applicant was scheduled to appear for an individual hearing on December 3, 2004; however, the applicant's former counsel indicated that he would not be able to prepare to go forward due to an illness. The court, upon listening to the tapes, noted that it had a full transcript of the original hearing of October 23, 2002. The IJ determined rather than have a *de novo* hearing, the transcripts would be read again and the IJ would render a formal decision and certified the decision back to the BIA. Therefore, it was not necessary for the applicant to appear before the court for another hearing.

The statements of counsel and the applicant on appeal have been considered. Because the court found the applicant to have filed a frivolous application for asylum, there is a lifetime bar to any benefit. Regardless of the temporary nature of TPS, it is still a benefit. The AAO 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.

ORDER: The appeal is dismissed.

² The tape containing the conclusion of the testimony appeared to have been defective.