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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

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

JAN 04 2011

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:

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 \$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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration and action.

The director determined that the applicant was permanently ineligible for any benefit under the Immigration and Nationality Act because he had previously filed a frivolous asylum application.

On appeal, the applicant asserts that the frivolous claim finding was reversed by the Board of Immigration Appeals on April 10, 2008. The applicant submits documentation to support his assertion.

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 the applicant's Form I-589, Application for Asylum and Withholding of Deportation, was filed on January 26, 2005.¹ 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. A Form I-862, Notice to Appear, was issued and served on the applicant on July 22, 2004. On December 9, 2005, the applicant 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.

On June 2, 2006, 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 April 10, 2008, the BIA *sustained* the applicant's appeal. The BIA determined that the frivolous claim determination was reversed as the evidence did not support the IJ's finding that the applicant knowingly and deliberately fabricated material elements of the claim.

The regulation at 8 C.F.R. § 1003.1(g) state, in pertinent part, that decisions of the BIA shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration law of the United States. Because the BIA did not uphold the IJ's finding that the applicant had filed a frivolous asylum application, the TPS application cannot be denied on that basis. Therefore, the director's decision will be withdrawn.

However, the evidence contained in the record is insufficient to establish the applicant's qualifying continuous residence in the United States since January 12, 2010, and continuous physical presence since January 21, 2010, as described in 8 C.F.R. § 244.2(b) and (c).

Therefore, the case will be remanded so that the director may request any additional evidence that she considers pertinent. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The case is remanded for further action consistent with the above and entry of a new decision.

¹ The applicant was initially a derivative of a Form I-589 filed by his father on November 11, 2000.