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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

PUBLIC COPY



M₁

DATE:

MAY 14 2012

Office: NEBRASKA SERVICE CENTER

FILE:



IN RE:

Applicant:



APPLICATION:

Application for Temporary Protected Status under Section 244 of the
Immigration and Nationality Act, 8 U.S.C. § 1254a

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 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 that he is a national of a foreign state designated by the Secretary, Department of Homeland Security (Secretary), and eligible for the granting of temporary protected status (TPS). The director also denied the application because two of the applicant's misdemeanor offenses resulted in criminal convictions.

On appeal, counsel asserts that having been born to a Haitian mother, the applicant is derivatively a Haitian citizen pursuant to Article 11 of the 1987 Haitian Constitution.

An alien shall not be eligible for TPS under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under the term "felony" of this section. For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 244.1.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

Pursuant to section 244(c) of the Act, an alien who is a national of a foreign state designated under subsection (b) of this section (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets the requirements of subsection (c) of this section, may be granted temporary protected status (TPS) in the United States. Further, 8 C.F.R. § 244.2(a) provides that an alien who 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, may, in the discretion of the director, be granted TPS. Section 101(a)(21) of the Act defines the term "national" to mean a person owing permanent allegiance to a state.

The burden of proof is upon the applicant to establish that he meets the above requirements. Applicants must submit all documentation required in the instructions or requested by U.S. Citizenship and Immigration Services (USCIS). 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 burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his own statements. 8 C.F.R. § 244.9(b).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The first issue to be addressed is the applicant's nationality.

The record reflects that the applicant was admitted into the United States on January 4, 1985, as a nonimmigrant visitor. At the time of his entry, the applicant listed his citizenship and country of residence as Panama. On August 17, 2007, a Form I-140, Immigrant Petition for Alien Worker, was filed on the applicant's behalf. The petition listed the applicant's nationality/citizenship as Panamanian.¹

On March 15, 2011, the director issued a Notice of Intent to Deny, which informed the applicant of his entry into United States on January 4, 1985 with a Panamanian passport. The applicant was advised that the documents submitted with his TPS application and a review of USCIS records failed to establish that he was a national of Haiti or in the alternative, a stateless person who last habitually resided in Haiti. The applicant was also advised of a discrepancy regarding his date of birth. The applicant indicated on his TPS application that he was born on [REDACTED] 1974; however, evidence in the record listed his date of birth as [REDACTED] 1974. The applicant was requested to submit evidence of his true date of birth along with a copy of his identity document with a photograph. Counsel, in response, submitted:

- An attestation from the Haitian Embassy in Washington, D.C. acknowledging that the applicant's mother, [REDACTED] is a Haitian national.
- An excerpt of Article 11 of the 1987 Haitian Constitution, which indicates that "[a]ny person, born of a Haitian father or Haitian mother who themselves were born Haitian, and never renounced their nationality at birth, possesses Haitian nationality of origin."
- A copy of the applicant's Panamanian passport issued on April 10, 2007, which reflects his date of birth as [REDACTED] 1974.
- A copy of the applicant's birth certificate with English translation, which reflects his date of birth as [REDACTED] 1974

Counsel asserted in pertinent part:

As the Applicant is born of a Haitian mother, and has never renounced his Haitian nationality, he is therefore a Haitian national according to the laws of Haiti. In addition, I wish to advise you that although the Applicant did enter using a Panamanian passport, he has been residing in the United States since 1985 and has no

¹ The petition was denied on October 1, 2008.

relations or acquaintances living in the country of Panama, or any other ties to Panama. His father is deceased and his mother, who is a Haitian citizen, resides in the United States. The Applicant therefore intends to renounce his Panamanian citizenship and retain only his Haitian citizenship.

The director, in denying the application, noted that Article 15 of the 1987 Haitian Constitution provides that "Dual Haitian and foreign nationality is in no case permitted." The director determined that the evidence of record failed to establish that the applicant is a national of Haiti or in the alternative, a stateless person who last habitually resided in Haiti. The director determined that the evidence of record did not establish that he had gained Haitian nationality subsequent to his birth in Panama. The director concluded that the applicant's "operative nationality" was not that of a TPS-designated country as held in GENCO Op. 84-22 (July 13, 1984) and *Matter of Ognibene*, 18 I&N Dec. 425 (BIA 1983).

Haitian nationality is governed by the Title II of the 1987 Haitian Constitution and the Decree of November 6, 1984, which provides at Article 7, that a child born in a foreign country of a foreign father and of Haitian mother will retain his foreign nationality until the year of his majority, at which time, he may acquire the Haitian nationality by means of a declaration at the Prosecution Department of the Civil Tribunal of his residence. In the instant case, the applicant reached the age of 18 in 2003, and in 2007, at the age of 22, the applicant continued to present himself as a citizen of Panama. The applicant has not provided any credible evidence establishing that he met the conditions and formalities to attain Haitian nationality.

The record is clear in establishing that the applicant elected to present himself as a citizen of Panama at the time he first entered the United States. Panama is not a designated foreign state under Section 244 of the Act. The applicant, therefore, does not meet the eligibility requirements of being a national of a state designated under section 244(b) of the Act. Accordingly, as the applicant has not demonstrated that his "operative nationality" is that of a TPS-designated country, the director's decision to deny the application for this reason will be affirmed.

The second issue to be addressed is the applicant's criminal history.

The Federal Bureau of Investigation report reveals the following offenses in the state of Virginia:

1. On [REDACTED] 1997, the applicant was arrested by the Northern Virginia Community College Police Department of Annandale, Virginia for indecent exposure.
2. On [REDACTED] 1997, the applicant was arrested by the Police Department of Arlington County for assault.
3. On [REDACTED] 2003, the applicant was arrested by the Police Department of Arlington County for destruction of property – monument.

On March 15, 2011, the applicant was also requested to submit certified judgment and convictions documents from the courts for all his arrests. Counsel, in response, submitted:

- Court documentation from the Arlington County Criminal Court, which indicates that the charge of destruction of property – monument was dismissed.
- A letter dated April 11, 2011, from the Fairfax County General District Court, which indicates that as of July 1985, its court is only required to retain cases for the time period of ten years.

As noted in the director's decision, USCIS records reflect that the arrests of [REDACTED] 1997 and [REDACTED] 1997 resulted in convictions. Specifically, on [REDACTED] 1997, the applicant was convicted of indecent exposure, a misdemeanor, and ordered to pay a \$250 fine. On [REDACTED] 1997, in the Arlington County General District Court, the applicant was found guilty of assault, a misdemeanor.

Counsel, on appeal, neither addresses the convictions nor provides any credible evidence to dispute the director's findings. Counsel merely reiterates that all records relating to the applicant's arrests in 1997 have been destroyed pursuant to the rules of the courts of the Commonwealth of Virginia.

As the courts routinely destroy old records as a matter of administrative procedure, this act does not affect an underlying charge or conviction. The applicant has the burden to establish, with affirmative evidence, that outstanding charges were dismissed or were in error.

The applicant is also ineligible for TPS due to his two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application on this ground will also be affirmed.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.