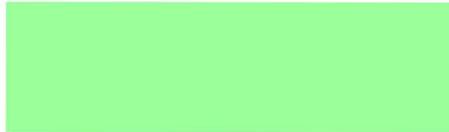




U.S. Citizenship
and Immigration
Services

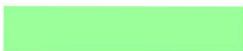
(b)(6)



DATE: NOV 13 2014

Office: VERMONT 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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further action and consideration.

The applicant is a native and citizen of Honduras who, on December 17, 1999, was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254. On January 21, 2014, the director withdrew TPS because it was determined that the applicant had failed to maintain continuous physical presence in the United States based on a removal from the United States in 2005.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

The regulation at 8 C.F.R. § 244.15 provides:

- (a) After the grant of Temporary Protected Status, the alien must remain continuously physically present in the United States under the provisions of 244(c)(3)(B) of the Act. The grant of Temporary Protected Status shall not constitute permission to travel abroad. Permission to travel may be granted by the director pursuant to the Service's advance parole provisions. There is no appeal from a denial of advance parole.
- (b) Failure to obtain advance parole prior to the alien's departure from the United States may result in the withdrawal of Temporary Protected Status and/or the institution or recalendering of deportation or exclusion proceedings against the alien.

The term brief, casual and innocent absence, as defined in 8 C.F.R. §244.1(1), means a departure from the United States in which each such absence was of short duration and reasonably calculated to accomplish the purpose(s) for the absence.

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. Section 212(a)(6)(C)(i) of the Act.

Except as provided in clause (iii), the Secretary may waive any other provision of section 212(a) in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Section 244(c)(2)(A)(ii) of the Act.

If an alien is admissible on grounds which may be waived, he or she shall be advised of the procedures for applying for a waiver of grounds of inadmissibility on Form I-601, Application for Waiver of Grounds of Inadmissibility. 8 C.F.R. § 244.3(b)

A misrepresentation is generally material only if by it the alien received a benefit for which he/she would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72.

The AAO conducts appellate review on a *de novo* basis. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The director, in his decision to withdraw TPS, noted that the record reflected that the applicant had departed the United States, returned to Honduras, re-entered the United States without inspection on July 24, 2005, had been apprehended by the U.S. Border Patrol, had been found inadmissible to the United States under section 212(a) of the Act, and had been removed from the United States for a period of five years.

A review of the record, however, does not support a finding that the applicant was removed from the United States.

The record contains a Form I-213, Record of Deportable/Inadmissible Alien, which indicates that on July 24, 2005, the applicant applied for admission into the United States at the San Ysidro port of entry. At the time of inspection the applicant presented his California driver's license and claimed to be a lawful permanent resident. During secondary inspection the applicant admitted that he was a Honduran citizen; that he only had an employment authorization card; that he knew it was against the law to falsely claim to be a lawful permanent resident; and that he had traveled to Mexico to party with his friends. The applicant was found to be inadmissible to the United States under sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I)¹ of the Act and was served with a Form I-860, Notice and Order of Expedited Removal. A Form I-296, Notice to Alien Ordered Removed/Departure Verification, was issued. The Form I-213 indicates that the applicant was "expeditiously removed from the United States for 5 years. [The applicant] was taken into DHS custody pending travel arrangements to his home country of Honduras."

On appeal, the applicant, in his affidavit, asserts that on July 23, 2005, he and his co-workers decided to go to [REDACTED] Mexico; that he and the co-workers returned to the United States on July 24, 2005; that at the time of inspection at the U.S. border, he presented his California driver's license and indicated "I am from here"; that he was detained because he did not obtain permission to depart and re-enter the United States; that he was transported to a detention facility and was informed he was to be deported to Honduras; that he waited a week to see a judge; and that after the week he was taken into a van and dropped off at a metro station in San Diego, California on August

¹ Section 212(a)(7)(A)(i)(I) of the Act shall not be applied in the determination of an alien's inadmissibility under section 244 of the Act. Section 244(c)(2)(A)(i) of the Act; 8 C.F.R. § 244.3(a).

2, 2005. The applicant states that he was not informed of any inadmissibility to the United States and was not removed from the United States.

The Forms I-860 and I-296 contain the applicant's photograph and his right index fingerprint; however, the forms are devoid of evidence establishing that the applicant had been removed as the verification of removal section is blank on each form. The record contains no other evidence to support a finding that the applicant had in fact been removed from the United States. It is noted that the record contains a printout indicating that removal proceedings were terminated. Therefore, without contemporaneous evidence to support a finding that the applicant had been removed from the United States, we cannot uphold the director's finding.

The applicant has not failed to maintain continuous physical presence in the United States since December 17, 1999, due to his one-day stay (July 23, 2005 to July 24, 2005) outside of the United States. 8 C.F.R. § 244.14(a)(2).

Consequently, the director's decision to withdraw the applicant's TPS will, itself be withdrawn.

Nevertheless, as a result of the applicant's claim to be a lawful permanent resident, he is deemed inadmissible under section 212(a)(6)(C)(i) of the Act. As previously noted, such ground of inadmissibility may be waived in relation to his TPS application pursuant to section 244(c)(2) of the Act; 8 C.F.R. § 244.3(b).

The case will be remanded so that the director shall provide the applicant the opportunity to file a Form I- 601, Application for Waiver of Grounds of Inadmissibility. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS. An adverse decision on the waiver application may be appealed to the AAO.

ORDER: The case is remanded for appropriate action and decision consistent with the foregoing.