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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

OFFICE: CALIFORNIA SERVICE CENTER

DATE: NOV 26 2007

[consolidated herein]

[WAC 05 123 75374]

IN RE:

Applicant:

[REDACTED]

APPLICATION:

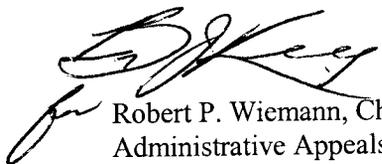
Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua 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 failed to establish that he was eligible for late registration.

On appeal, counsel submits a statement and additional evidence.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) 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;
- (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 Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under § 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for TPS 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.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of condition described in paragraph (f)(2) of this section.

The term *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

The term *continuously physically present*, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

Persons applying for TPS offered to Nicaraguans must demonstrate that they have continuously resided in the United States since December 30, 1998, and that they have been continuously physically present since January 5, 1999. On May 11, 2000, the Attorney General announced an extension of the TPS designation until July 5, 2001. Subsequent extensions of the TPS designation have been granted with the latest extension valid until January 5, 2009, upon the applicant's re-registration during the requisite time period.

The initial registration period for Nicaraguans was from January 5, 1999 through August 20, 1999. The record shows that the applicant filed his TPS application on January 18, 2005.

To qualify for late registration, the applicant must provide evidence that during the initial registration period he fell within at least one of the provisions described in 8 C.F.R. § 244.2(f)(2) above. If the qualifying condition or application has expired or been terminated, the individual must file within a 60-day period immediately following the expiration or termination of the qualifying condition in order to be considered for late initial registration. 8 C.F.R. § 244.2(g).

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

In a Notice of Intent to Deny (NOID) dated March 16, 2006, the applicant was requested to submit evidence to establish that he had met the requirements for late registration. The director noted that the evidence furnished by the applicant in response to the NOID consisted of a letter from his attorney, a copy of Form I-485, a copy of Form I-765 transfer notice, a copy of USCIS letter, a copy of an Employment Authorization, and a copy of Service Motion to Reopen/Reconsider letter; however, the response did not provide any information regarding eligibility for late registration. The director, therefore, denied the application on May 16, 2006.

On appeal, counsel asserts that the director erred in his determination that the applicant failed to register for TPS in a timely manner. She states that although the applicant's Form I-485 [Application to Register Permanent Residence or Adjust Status, pursuant to section 202 of Public Law 105-100 of the Nicaraguan Adjustment and Central American Relief Act (NACARA)] was denied on March 13, 2003, the applicant also had a petition for review pending before the Ninth Circuit Court of Appeals which was ultimately denied on November 3, 2004. She further states that the applicant, in accordance with the late registration requirement in 8 C.F.R. § 244.2(g), then applied for TPS on December 14, 2004, well within 60 days of the Ninth Circuit's decision. Counsel asserts that CIS acknowledged receipt of the applicant's TPS application on December 14, 2004; however, because the form was allegedly completed on an out-dated form, it was not accepted by CIS. She further asserts that the "regulations do not specify that the TPS application *must* be the most current form and instead only focus on the *date* of the filing of the TPS application. See 8 C.F.R. § 244.2, *supra*."

A review of the record reveals the following:

1. The Federal Bureau of Investigation (FBI) fingerprint results report indicates that the applicant, under the name of [REDACTED] was arrested by the United States Border Patrol on October 14, 1995, subsequent to his entry into the United States without inspection near McAllen, Texas. File [REDACTED] was created. The record of proceeding contains Form I-221, Order to Show Cause and Notice of Hearing, issued on December 14, 1995, in Los Angeles, California, indicating that [REDACTED] was arrested subsequent to his entry [reentry] into the United States on December 12, 1995, near Brownsville, Texas.
2. In removal proceedings held on May 28, 1997, in Los Angeles, California, [REDACTED] Lopez failed to appear; therefore, the Immigration Judge determined that any pending applications are considered abandoned and denied, and ordered [REDACTED] removed to Nicaragua *in absentia*. A Warrant of Removal/Deportation, Form I-205, was issued on June 4, 1997. Also on June 4, 1997, Form I-166 was issued notifying [REDACTED] to appear at the Los Angeles district office on July 9, 1997, for his enforced departure. He failed to appear.
3. The applicant, under the name of [REDACTED], filed Form I-485 application for adjustment of status under the NACARA Act on August 1, 1999. File [REDACTED] was created.
4. For the purpose of verification of identity of [REDACTED] following an FBI fingerprint match with [REDACTED] Service officers appeared at the residence of [REDACTED] on August 16, 2001. When the officers identified themselves, [REDACTED] exited the rear of the apartment, running from the officers; he was subsequently apprehended. [REDACTED] admitted to being the fugitive alien subject to the warrant of deportation under the name of [REDACTED]. Among documents provided by the family was Texas State ID bearing the name of [REDACTED] a California State ID bearing the name of [REDACTED] and a Nicaraguan passport issued to [REDACTED] on April 24, 2001, in Nicaragua.
5. On August 17, 2001, the applicant [REDACTED] filed a motion to reopen the "*in absentia* deportation order; request for stay." Also on August 17, 2001, the IJ ordered that the application for a stay of deportation be granted "until the court receives and reviews the record file relating to respondent." On August 27, 2001, the IJ ordered that the motion to reopen and stay of deportation be denied. The applicant appealed the IJ's decision to the Board of Immigration Appeals (BIA) on September 26, 2001. On March 3, 2003, the BIA affirmed, without opinion, the results of the IJ's determination.
6. On March 14, 2003, the Interim District Director, Los Angeles, California, denied the application for status as a permanent resident (Form I-485) because the applicant had failed to submit requested evidence. On March 18, 2003, the district director reopened her previous decision on a Service Motion to Reopen/Reconsider and ordered the Form I-485 reopened and the adjudication process continued regarding adjustment to permanent residence pursuant to section 245 of the Act.
7. On March 17, 2003, the applicant filed with the United States Court of Appeals for the Ninth Circuit, a petition for review of the decision of the BIA summarily affirming the IJ's denial of his motion to reopen the IJ's *in absentia* order of deportation. In a memorandum decision

filed on June 25, 2004, the Ninth Circuit Court denied the petition for judicial review. The court's mandate was issued on November 12, 2004.

8. Form I-797C, Notice of Action, was issued on December 20, 2004, informing the applicant that the Form I-821, Application for Temporary Protected Status, received on December 14, 2004, was being returned because the "application/petition was filed on an outdated version of this form. Please resubmit your application/petition on the current version of this form with the appropriate fees to the address listed on the bottom of this notice." The applicant resubmitted Form I-821 which was received at the California Service Center on January 31, 2005, under receipt number WAC 05 123 75374.

As noted in No. 7 above, the Ninth Circuit Court's mandate was issued on November 12, 2004. Pursuant to 8 C.F.R. § 244.2(g), the applicant had 60 days immediately following the court's decision to file an application for late registration under TPS. Counsel asserts that the TPS application initially received on December 14, 2004, was filed within the 60-day period, and it should not have been returned based on an outdated form because regulations at 8 C.F.R. § 244.2 do not specify that the TPS application *must* be the most current form.

As stated by counsel, 8 C.F.R. § 244.2 does not specify that the most current TPS form must be used. Additionally, pursuant to 8 C.F.R. § 103.2(a)(7), an application or petition that is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed, and rejected applications and petitions, and ones in which the check or other financial instrument used to pay the filing fee are subsequently returned as non-payable will not retain a filing date. The regulations do not address the usage of an outdated form. Furthermore, the USCIS website instruction for downloading the Form I-821 indicates that "prior versions acceptable."

Most importantly, as noted in No. 6 above, although the Los Angeles district director denied the Form I-485 adjustment of status on March 14, 2003, the district director reopened her previous decision and ordered the Form I-485 reopened. It appears that the Form I-485 remains pending as there is no evidence in the record that the Form I-485 had been adjudicated.

The record in this case indicates that during the initial registration period, the applicant had an application for adjustment of status that was pending or subject to further review when he filed his TPS application. Accordingly, the applicant has established that he has met the criteria for late registration described in 8 C.F.R. § 244.2(f)(2)(ii).

Additionally, the evidence contained in the record of proceeding is sufficient to establish that the applicant has met the continuous residence and continuous physical presence requirements described in 8 C.F.R. § 244.2(b) and (c). There are no other known grounds of ineligibility; therefore, the director's decision will be withdrawn and the appeal will be sustained.

An alien applying for temporary protected status 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 met this burden.

ORDER: The appeal is sustained and the application is approved.