

Genco Op. No. 92-34 (INS), 1992 WL 1369373

U.S. Department of Justice

Immigration and Naturalization Service

General Counsel's Office

Legal Opinion Your Memorandum of February 28, 1992: Guidance on Eligibility of Dual Nationals for TPS Benefits

James A. Puleo, Associate Commissioner, HQEXM

CO 244A-C

August 7, 1992

\*1 ATTN: Janet Thomas, Senior Immigration Examiner

## I. QUESTION

In the subject memorandum, you request an opinion concerning the following question:

May the Service deny an application for Temporary Protected Status (TPS) in the case of an alien who, although a national of a foreign state designated for TPS, is also a national of another foreign state that has not been designated for TPS?

## II. SUMMARY CONCLUSION

The Service may, in the exercise of discretion, deny TPS in the case of an alien who, although a national of a foreign state designated for TPS, is also a national of another foreign state that has not been designated for TPS.

## III. ANALYSIS

The Attorney General designated Lebanon for TPS on March 27, 1991. 56 F.R. 12,746 (1991). Under this designation, nationals of Lebanon may register for TPS during the period ending March 27, 1992. *Id.* The Attorney General recently extended the designation of TPS for nationals of Lebanon. 57 F.R. 2,931 (1992). The new expiration date is March 28, 1993. *Id.*

During the registration period, the Service has received at least four applications for TPS by aliens who are nationals of Venezuela. These aliens entered the United States with Venezuelan passports endorsed with "B" nonimmigrant visas issued by a United States consular officer in Venezuela. They claim to be eligible for TPS because they are also nationals of Lebanon.

In addition to certain other requirements which are not germane to this issue, an alien who applies for TPS must prove that he or she is either a national of a foreign state which the Attorney General has designated for TPS or a stateless person who last habitually resided in the designated foreign state. See INA 244A(c)(1)(A), 8 U.S.C. 1254a(c)(1)(A), as amended by Miscellaneous and Technical Immigration and Naturalization Amendments, 1991, Pub. L. No. 102-232, 304(b)(1), 105 Stat. 1733, 1749 (1991). This nationality requirement may be contrasted with the nationality requirement for asylum or refugee resettlement. To qualify as a refugee, an alien must be unable or unwilling to return to "any country of such person's nationality" or, for a stateless person, to any country of habitual residence. See INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) (emphasis added). In contrast to the requirements to qualify as a refugee, there is no requirement that each country of which a TPS applicant is a national be designated for TPS. *Id.* 244A(c)(1)(A), 8 U.S.C. 1254a(c)(1)(A). The fact of dual nationality, therefore, would not strictly preclude an alien from satisfying the nationality requirement for TPS.

The Service could dispose of these aliens' claims to Lebanese nationality in either of two ways. First, following the reasoning in *Matter of Ognibene*, 18 I&N Dec. 425 (R.C. 1983), the Service could assume, *arguendo*, that these aliens are dual nationals, but hold them bound by the claim of Venezuelan nationality they made at the time of their admission to the United States. *Id.* at 428. Every alien seeking a nonimmigrant visa or admission into the United States as a nonimmigrant is presumed to be an intending immigrant, unless the alien proves the contrary. INA 214(b), 8 U.S.C. 1184(b). In order to enter the United States, the aliens in these cases had to satisfy the United States consul in Venezuela and the immigration inspector at the port of entry that they were bona fide nonimmigrants. *Id.* The issuance of the visas and their admission to the United States indicate that they persuaded these officers that they had "a residence in a foreign country which [they had] no intention of abandoning." *Id.* 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B). Given the turmoil in Lebanon, it is reasonable to assume that the aliens would have had greater difficulty in meeting this requirement had they sought admission as Lebanese nationals. Thus, just as in *Ognibene*, it is likely that the aliens' claims to be nationals of Venezuela facilitated their entry into the United States. They should not now be able to claim a different nationality in order to manipulate their status under our immigration laws. 18 I&N Dec. at 428.

\*2 As an alternative, the Service could require each of these applicants affirmatively to prove through submission of appropriate evidence that he or she is a national of Lebanon. See, e.g., 8 C.F.R. 240.9(a)(1) (1991). For example, if the applicant became a national of Venezuela through naturalization, he or she may reasonably be required to show that,

under the nationality laws of Lebanon, the acquisition of Venezuelan nationality did not result in the loss of Lebanese nationality.

Ultimately, however, the Service need not resolve the issue of the nationality of these applicants in order to deny their applications. The Service need not decide whether an alien meets the threshold requirements established by statute, if, even assuming eligibility, denial of a benefit is warranted in the exercise of discretion. See *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Rios-Pineda*, 471 U.S. 444 (1985). Whether to grant TPS to an eligible alien is a matter entrusted to administrative discretion. If an alien meets the eligibility requirements, the Attorney General “may grant the alien temporary protected status.” INA 244A(a)(1)(A), 8 U.S.C. 1254a(a)(1)(A) (emphasis added). The Attorney General has delegated this discretion to the district directors. 8 C.F.R. 240.10(b).

We conclude that it would not be an abuse of discretion for a district director to deny TPS in the case of a dual national. We base this conclusion on the limited purpose and temporary nature of TPS. The limited purpose of TPS is clear from the text of the statute itself. See *Mallard v. United States Dist. Ct. for South. Dist. of Iowa*, 109 S.Ct. 1814, 1818 (1989); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984); *Richards v. United States*, 369 U.S. 1, 9 (1962). TPS is not a provision designed to create a general right to remain in the United States. Rather, the statute provides a regularized means of granting haven to aliens who, because of extraordinary and temporary circumstances, cannot return to their home country in safety. See *id.* 244A(b)(1)(A), (B), and (C), 8 U.S.C. 1254a(b)(1)(A), (B), and (C).

The temporary nature of TPS is also clear from the text of the statute. The Attorney General may not designate a foreign state for a period exceeding eighteen months. *Id.* 244A(b)(2), 8 U.S.C. 1254a(b)(2). Furthermore, an alien granted TPS is not permanently residing in the United States under color of law. *Id.* 244A(f)(1), 8 U.S.C. 1254a(f)(1). Absent extraordinary circumstances, time spent in the United States under TPS “shall not be counted as a period of physical presence” for purposes of suspension of deportation. *Id.* 244A(e), 8 U.S.C. 1254a(e). Under Senate rules adopted as part of the TPS statute, private bills that would enable aliens granted TPS to adjust to temporary or permanent residence are out of order, unless three-fifths of the members of the Senate agree to consider such legislation. *Id.* 244A(h), 8 U.S.C. 1254a(h). Congress clearly did not intend TPS as a means of remaining in the United States for an extended period, nor for obtaining permanent resident status in the United States. We are aware that an alien granted TPS does not lose whatever eligibility for adjustment of status he or she might have had simply because of a grant of TPS. INA 244A(f)(4), 8 U.S.C. 1254a(f)(4). Yet this provision does not so much provide for acquisition of a durable status in the United States as merely to remove what might otherwise serve as a bar to such acquisition. See INA 245(c), 8 U.S.C. 1255(c). TPS is a limited and temporary measure designed to allow aliens who cannot return to their home countries in safety to remain temporarily in the United States. The circumstances which prompted the Attorney General to designate Lebanon for TPS does not prevent the aliens in these cases from returning in safety to their homes in Venezuela. Denying their applications for TPS, in the exercise of discretion, would not frustrate the statutory purpose of granting haven to aliens who are unable to do so.

\*3 /s/ GROVER JOSEPH REES III

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