

2012 WL 8526681 (INS)
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
Nebraska Service Center

IN RE: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C, § 1254
On Behalf of Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY]
File No. [IDENTIFYING INFORMATION REDACTED BY AGENCY]
December 4, 2012

*1 DISCUSSION: The application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native of Mexico and claims to be a citizen of both Mexico and Haiti 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 withdrew TPS on December 6, 2011, after determining that the applicant had been firmly resettled in Mexico. On appeal, the counsel asserts that although the applicant was born in Mexico she is eligible for TPS as a national of Haiti because she is the child of a citizen of Haiti. He contends that the applicant cannot be deemed firmly resettled in Mexico being a citizen of Mexico and having resided there from birth until she came to the United States. The AAO has reviewed all of the evidence, and has made a de novo decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

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

- Is a national of a state designated under section 244(b) of the Act;
- Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- Has continuously resided in the United States since such date as the Secretary may designate;
- Is admissible as an immigrant except as provided under section 244.3;
- Is not ineligible under 8 C.F.R. § 244.4.

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.

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.

*2 On January 21, 2010, the Secretary designated Haiti as a country eligible for TPS. This designation allowed nationals of Haiti who have continuously resided in the United States since January 12, 2010, and who have been continuously physically present in the United States since January 21, 2010, to apply for TPS. On May 19, 2011, the Secretary announced an extension of the TPS initial designation for Haiti until January 22, 2013. On May 19, 2011, the Secretary also re-designated Haiti for TPS eligibility which became effective on July 23, 2011, and remains in effect until January 22, 2013, upon the applicant's re-registration during the requisite time period. This redesignation allowed nationals of Haiti who have continuously resided in the United States since January 12, 2011, and who have been continuously physically present in the United States since July 23, 2011, to apply for TPS. The initial registration period for the new re-designation began on May 19, 2011, and ended on November 15, 2011.

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 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 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).

The first issue in this proceeding is whether the applicant has been firmly resettled in Mexico, and therefore, ineligible for TPS as a national of Haiti.

An alien shall not be eligible for TPS if the Attorney General finds that the alien was firmly resettled in another country prior to arriving in the United States. Sections 244(c)(2)(B)(ii) and 208(b)(2)(A)(vi) of the Immigration and Nationality Act (the Act).

As defined in 8 C.F.R. § 208.15, an alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

- That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or
- That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

*3 The record indicates that the applicant was born in Mexico, has been a citizen of Mexico from birth, and resided there from birth until she entered the United States in 2004. The applicant also claims to be a citizen of Haiti, having derived Haitian citizenship through her father, a native and citizen of Haiti. The record indicates that the applicant has never resided in Haiti.

As counsel contends, the applicant cannot be deemed firmly resettled in the country of her birth and citizenship. We do not find the facts of this case support a finding that the applicant has been firmly resettled in Mexico as the applicant is a citizen of Mexico and before coming to the United States she had resided only in Mexico. Therefore, the director's decision to withdraw TPS for that reason is withdrawn.

Beyond the decision of the director, the next issue in this proceeding is whether the applicant's operative nationality is Mexican and she is, therefore, ineligible for TPS.

Counsel asserts, on appeal, that the applicant was eligible for TPS because she is a dual citizen of Mexico and Haiti. In support of his assertion, the applicant submits a photocopy of Mexican passport, her Mexican birth certificate, and the Haitian birth certificate and Haitian passport of her father. The applicant did not submit any evidence, such as a Haitian passport or identification card to indicate that she is a citizen of Haiti.

In *Chee Kin Jang v. Reno* 113 F. 3d 1074 (9th Cir. 1997), the United States Court of Appeals found that the Service reasonably interpreted the term ““PRC national” in the Chinese Student Protection Act (CSPA) to exclude Chinese dual nationals who did not declare citizenship of the People's Republic of China (PRC) when they entered the United States, and that the Service's treatment of PRC dual nationals, depending on whether they entered under a PRC passport or a passport of a different country, was reasonable. The Court states that an alien is bound by the nationality claimed or established at the time of entry for the duration of his or her stay in the United States. Thus, a dual national CSPA principal applicant must have claimed PRC nationality at the time of his or her last entry into the United States. Additionally, the Board of Immigration Appeals, in *Matter of Ognibene*, 18 I&N Dec. 425 (BIA 1983), concluded that although an alien may hold the phenomenon of dual nationality, an alien may only claim one citizenship at a time for purposes of immigration matters within the United States. As explained in *Ognibene*, clearly, it is not the prerogative or position of the United States to require a dual national alien nonimmigrant to elect to retain one or another of his nationalities. Equally as clear, the national sovereignty of the United States is acceptably and reasonably exercised through section 214 of the Act in holding that a dual national alien nonimmigrant is, for the duration of his temporary stay in the United States, of the nationality which he claimed or established at the time that he entered the United States.

*4 The Board, in *Ognibene*, further held that under appropriate circumstances in a given proceeding of law, the operative nationality of a dual national may be determined by his conduct without affording him the opportunity to elect which of his nationalities he will exercise. The General Counsel, in *GENCO Op. 84-22* (July 13, 1984), reinforced this concept and states, “In interpreting a law which turns on nationality, the individual's conduct with regard to a particular nation may be examined, An individual's conduct determines his ‘operative nationality.’ The “operative nationality” is determined by allowing the individual to elect which nationality to exercise. The nationality claimed or established by the nonimmigrant alien when he enters the United States must be regarded as his sole nationality for the duration of his stay in the United States.” [Emphasis in original].

Additionally, the General Counsel, in *GENCO Op. 92-34* (August 7, 1992), concluded that 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. The General Counsel explains that “TPS is

not a provision designated 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. § 1254(b)(1)(a), (b), and (e).” While the applicant, in this case, entered the United States without inspection, we find that the applicant claimed to be a national and citizen of Mexico throughout her immigration proceedings. The nationality the applicant claimed and/or established at the time she first came into contact with USCIS was that of Mexico. On subsequent filings before the USCIS, including her Form I-765, Application for Employment Authorization, and her Form I-131, Application for Travel Authorization, the applicant continued to present herself as a Mexican citizen. Therefore, this citizenship must be regarded as the applicant's operative nationality during these proceedings.

Mexico 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. As the applicant has not demonstrated that her “operative nationality” is that of a TPS-designated country, the director's decision to deny the application will be affirmed, as a matter of discretion.

The application will be denied for the above stated reason. 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.

*5 ORDER: The appeal is dismissed.

Ron Rosenberg
Acting Chief
Administrative Appeals Office

Footnotes:

The AAO conducts appellate review on a de novo basis. The AAO's de novo authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).
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