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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



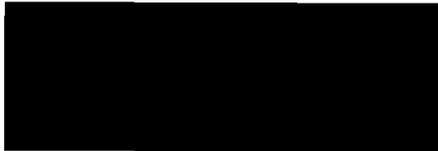
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DATE: MAR 26 2012 Office: VERMONT SERVICE CENTER FILE: 

IN RE: Applicant: 

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

ON BEHALF OF APPLICANT:

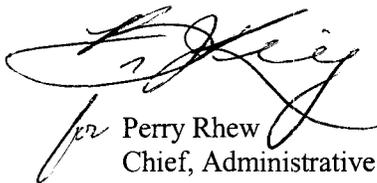


INSTRUCTIONS:

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 Vermont 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 Vermont 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, Vermont Service Center. The application is now before the Administrative Appeals Office on appeal. The case will be remanded for further action.

The applicant is a native and citizen of El Salvador 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 it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others.

On appeal, counsel indicated that on September 29, 2009, the applicant litigated his NACARA application before an immigration judge in Boston, Massachusetts. Counsel further indicates that at that time, the issue of whether the applicant were barred from relief pursuant to the persecutor bar “was fully litigated and the Immigration Judge held that respondents testimony was credible and he had met his burden to demonstrate that he was not a persecutor.”

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 is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a 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 Secretary may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4.

Section 244(c)(2)(B)(ii) of the Act provides that an alien shall not be eligible for TPS under this section if the Secretary finds that the alien is described in section 208(b)(2)(A) of the Act.

Section 208(b)(2)(A)(i) of the Act states, in pertinent part:

- (A) In general – Paragraph (1) shall not apply to an alien if the Attorney General determines that– (i) the alien ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

The applicant testified to an Asylum Officer on June 7, 2002, that he had served in the El Salvadoran military from 1985 to 1989 in the [REDACTED] in the city of San Miguel, his commanding officer was [REDACTED], he was assigned to a Special Forces group (GOS) responsible for reconnaissance, and he saw combat at least ten times. According to the interviewing notes of the asylum officer:

He [the applicant] indicated that he received special training in how to reconnoiter areas where there were "subversive elements" and to collect information. Applicant indicated that his group dressed as civilians and went into the countryside to question civilians in villages and farms in order to obtain information about movements of subversive groups (i.e. guerrillas) in the area. He indicated that even though they were dressed in civilian clothes, the people they questioned knew that they were members of the military.

Applicant indicated that the information was relayed back to the command post, which would report it to the base. He states that the information was then used to send troops into the area. Applicant stated that the mission of his group was to "protect civilians."

Applicant stated that in his four years in the military he never harmed civilians but rather, was "extremely careful" with them. He indicated he never used force to obtain information. He never heard about threats or force being used against the civilian population by the military and he never took prisoners.

Information received from R [REDACTED] in response to my inquiry concerning this case indicates that San Miguel during the period in question was one of the more highly conflictive departments in the country and with regard to the ARCA [REDACTED] in particular indicates: "In its 1988 annual report Amnesty International singled out the [REDACTED] for the execution-style killings of five peasants in San Miguel department in late spring 1987.

* * *

Based on the information provided by the [REDACTED] about the [REDACTED] and its commander, I cannot find credible the applicant's assertion that he never took prisoners or harmed anyone. Even less credible is his contention that he never heard of anyone in the military torturing anyone - torture by the military was widespread and well-known throughout El Salvador during the war.

The interviewing officer determined that the applicant's lack of credibility regarding his military experience raised the reasonable possibility that he engaged in persecutory activities while serving in the [REDACTED] from 1985 to 1989. The officer further determined that country conditions provided indirect evidence that the grounds for the persecution of others was on

account of political opinion. The officer concluded that “because the applicant failed to clearly establish otherwise, he is subject to the mandatory bar, persecution of others.”

Based on the interviewing officer’s notes, the director concluded that the applicant was not eligible for TPS because he was an alien described in section 208(b)(2)(A)(i) of the Act, and denied the application on May 20, 2011.

In *Miranda-Alvarado v. Gonzalez*, 449 F.3d 915, 927 (9th Cir. 2006), the court held that “determining whether a petitioner ‘assisted in persecution’ requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability . . . [m]ere acquiescence or membership in an organization is insufficient to satisfy the persecutor exception.”

In *Matter of Rodriguez-Mejano*, 19 I&N Dec. 811, 814-15 (BIA 1988), it was held that if an applicant’s action or inaction furthers persecution in some way, he or she is ineligible for relief. However, mere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief.

A removal hearing was held on September 29, 2009, and the immigration judge found that the applicant’s service in an El Salvadoran military unit was insufficient, by itself, to invoke the persecutor bar. Specifically, the transcript of the record of proceedings reads, in pertinent part:

As to the persecutor bar, the court finds that it should not apply to the respondent. Although the respondent served in the Salvadorian military during four years of that country’s civil war, and although the respondent received weapons training and carried an M-16 and/or an M79 during the course of his service, and although he went on security patrols, and although he shot his weapon upon being ambushed on more than one occasion, there is no evidence on which the court could base a finding that he was a persecutor of others. He did not capture others, and there was no evidence that he participated in any human rights violations or assisted others. Although he heard news reports of such incidents occurring before and after he was in the military, he did indicate that while he was in the military he did not hear such news reports because he was in the military doing his job. The most that could be said of the respondent is that when he was on patrol he questioned civilians as to the whereabouts of gorillas, and as he explained it it was as much for his own safety as for the Salvadorian intelligence. The civilians readily provided this information, and there was no interrogation of civilians, as such. [*sic*]

Although there were some evidence presented by the government that the commanding officer of the battalion to which the respondent was assigned may have had some involvement in the killing of perhaps hundreds of people suspected of being leftists and who was at least at one time accused of helping to run a kidnapping ring, the fact that this individual () was

the respondent's commanding officer, does not necessarily mean that the respondent himself was involved in human rights violations, and there is no evidence on which the court can base such a finding. Therefore, the court does not find that the persecutor bar is a hinderance to the respondent's NACARA application. [sic]

[Typographical errors in the original transcript]

To be statutorily ineligible for TPS, section 208(b)(2)(A)(I) of the Act specifies that an alien must have "ordered, incited, assisted or otherwise participated in the persecution of any person" There is no evidence in the record that the applicant "ordered" or "incited" any persecutory activities. While "assist[ing] or other partipat[ing]" in persecutory activities would require less direct involvement by the applicant, there is no evidence to link the applicant to persecutory activities, at this more attenuated level.

In the instant case, there is no evidence that the applicant personally "assisted or otherwise participated" in any persecutory activities. To reach such a conclusion would be through a "guilty by association" link to the ARCE Battalion in which the applicant served under his commanding officer, which has been cited as committing such abuses. However, this would not fall within the purview of section 208(b)(2)(A)(i) of the Act. Accordingly, the director's decision to withdraw TPS based on ineligibility under section 208(b)(2)(A)(i) of the Act will, itself, be withdrawn.

The case will be remanded to the director for further adjudication of the TPS application. A review of the record reflects that the validity period of the applicant's fingerprint check has expired. Therefore, the case will be remanded for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. Should the decision be adverse, the director must give written notice setting forth the specific reasons for the denial pursuant to 8 C.F.R. § 103.3(a)(1)(i), and the applicant shall be permitted to file an appeal without fee.

ORDER: The case is remanded for further action consistent with the above and entry of a new decision.