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

(b)(6)

DATE: APR 0 4 2013

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 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank, you,

Ron Rosenberg
Acting 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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew the applicant's TPS because: (a) it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others; and (b) the applicant failed to submit requested court documentation relating to his criminal record.

On appeal, counsel asserts that the applicant has one misdemeanor conviction for driving under the influence in California. Counsel, citing case law, argues that there is no evidence that the applicant participated in any activity that has been defined by the courts as one that would trigger the persecutor bar. Counsel puts forth a brief disputing the director's finding that the applicant was a persecutor.

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. Section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1).

An alien shall not be eligible for TPS if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under the term "felony" of this section. For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 244.1.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

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 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 first issue to address is whether the applicant is subject to the persecutor bar.

The applicant testified to an Asylum Officer on June 15, 2004, that he had served in the El Salvadoran military as a soldier with the Hacienda Police from 1987 through 1989. The applicant testified that he was trained for four weeks in community service, battle techniques, social and cultural environment of the army, and explosives and demolition. The applicant testified that his unit prepared and deactivated mines. When asked to describe how he prepared mines, the applicant stated, "take out the explosive, put a line to detonate the explosives in a series of 15 to 20 mines." The applicant testified that he was not aware of the locations the mines were being placed, and that he never encountered the enemy. The applicant testified that he never served in combat, never took or guarded a prisoner, never interrogated anyone and did not witness any civilians being captured, interrogated or tortured.

In his interview on May 24, 2007, the applicant reiterated his claim of service in the El Salvador army from 1987 through 1989. The applicant indicated that he attended the police academy for six months and became a police officer; that he also trained for approximately six to eight weeks on how to handle explosives; that he was assigned to Libertadores Battalion for three to four months; that while serving in Libertadores Battalion, he secured bridges and embassies; that he was engaged in combat on two occasions against the guerrillas (FMLN); that he never took any prisoners; that he never witnessed or heard of any abuse of the Policia De Hacienda; and that he was not aware of any human rights violations.

In issuing his decision on June 1, 2011, the director noted that according to the Resource Information Center (RIC), country conditions indicate that during the timeframe that the applicant served, the Treasury Police and particularly Liberators Battalion perpetrated numerous human rights violations. The applicant denied participating in human rights abuses during his military service. However, the director determined that the persecutor bar applies even if the applicant did not personally commit the persecutory act, so long as the applicant 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 director concluded, in pertinent part:

> Your testimony was found not credible with respect to inconsistent and vague testimony denying knowledge of human rights abuses. In light of the country conditions information provided by the RIC, it appears highly unlikely that you were not aware of and did not participate in persecutorial acts from 1987 to 1989. You were a member of a unit that has been documented as committing numerous human right abuses. As such, you have the burden of proving by a preponderance of the evidence that the ground does not apply. During your NACARA/asylum claims, you failed to establish that you did not take part in any violation and therefore, you are barred as a persecutor.

The director concluded that the applicant was not eligible for TPS as he was an alien described in section 208(b)(2)(A)(i) of the Act.

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. Therefore, the applicant's membership in an El Salvadoran military unit is insufficient, by itself, to invoke the persecutor bar

Mere association with an organization that engages in persecution is insufficient to trigger the bar). *Xu Sheng Gao, v. U.S. Atty. Gen.*, 500 F.3d 93, 99 (2d Cir. 2007). In *Miranda-Alvarado v. Gonzalez*, 449 F.3d 915, 927 (9th Cir. 2006), it was 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 *Singh v. Gonzales*, 417 F.3d 736 (7th Cir. 2005), it was held that simply being a member of a local Punjabi police department during the pertinent period of persecution is not enough to trigger the persecutor bar.

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 ...." While the RIC has been cited as evidence that persecutory acts were committed by the applicant's units, it did not specifically link the applicant to these acts. 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. To reach such a conclusion would be through a guilty by association link to the Treasury Police and Liberators Battalion, which have 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 second issue to be addressed is if the applicant's criminal history renders him ineligible for TPS.

The Federal Bureau of Investigation report dated October 21, 2010, reflects that: (1) on March 15, 1992, the applicant was arrested by the of California for driving under the influence, driving without a license and driving under the influence causing bodily injury; and (2) on July 9, 2008, the applicant was arrested or received by the Sheriff's Office of California for driving with .08 percent or more alcohol in the blood.

In response to the notice dated January 14, 2011, which requested the applicant to submit certified judgment and conviction documents for all arrests, the applicant provided:

- Court documentation in Case no from Municipal Court, which indicates that on March 17, 1992, the applicant was convicted of violating section 23152(b) CVC, driving with .08 percent or more alcohol in the blood, a misdemeanor. The applicant was placed on summary probation for four years on condition he serve 10 days in the county jail, pay a fine and court cost, and enroll in a three-month first offender alcohol program. The remaining charges were dismissed. On May 27 1992, a bench warrant was ordered as the applicant failed to appear in court.
- A letter dated July 11, 2001, from the California Department of Justice, which included a copy of the applicant's criminal record. The record listed offenses occurring on March 15, 1992 and July 9, 2008.
- Court documents relating to offenses committed in the state of Massachusetts in 1997 and 2000 that were dismissed by the courts.
- A statement from the applicant indicating that he was not arrested on July 9, 2008, by the Sheriff's Office in California.

The director, in his decision, noted that while the applicant had disputed the arrest on July 9, 2008, he had failed to submit any evidence from the courts or the Sheriff's Office in California to corroborate his statement.

On appeal, counsel asserts that the applicant's 1992 arrest in California was resolved in 2008. Counsel states, in pertinent part:

> The 1992 California charges remained open because [the applicant] never received noticed [sic] of the court date and he did not find out about the open cases until his immigration counsel identified the matter in 2008. Having discovered the matters, [the applicant] traveled to California, hired private counsel and was able to get the first two counts dismissed and he served ten days for the third count and paid a fee of over $1,000.00.

Counsel's assertions, however, are not supported by the record. First, the court docket in Case no. clearly indicates that the applicant was charged and subsequently convicted on March 17, 1992 of violating section 23152(b) CVC. Second, the court docket indicates that the applicant was scheduled to appear for a restitution hearing on May 4, 1992, but failed to appear and a bench warrant was ordered. On May 6, 1992, the applicant was present in court and the bench warrant was recalled. The applicant's probation was reinstated on the same terms and conditions, and the hearing was continued to May 27, 1992, for proof of enrollment in an alcohol program and or completion. As noted above, the applicant failed to appear in court on May 27, 1992.

Counsel has not submitted any corroborating documents from the court to support his assertions. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The applicant has the burden to establish, with affirmative evidence, that his offenses of 1992 and 2008 are one and the same.

The applicant has failed to provide any evidence revealing the final disposition of his arrest/detainment on July 9, 2008. The applicant is ineligible for TPS because of his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). Consequently, the director's decision to withdraw TPS will be affirmed.

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.

ORDER: The appeal is dismissed.