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: FEB 05 2013 Office: CALIFORNIA 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 California 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 application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration and action.

The applicant is a native and citizen of 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 denied the application because it was determined that the applicant was inadmissible under the provisions of section 212(a)(6)(C)(i) of the Act for having misrepresented a material fact; and, was also ineligible for TPS under section 208(b)(2)(A)(i) of the Act for having ordered, incited, assisted or otherwise participated in the persecution of others.[1]

On appeal, counsel asserts that the director erred in denying the application because of inadmissibility under the provisions of section 212(a)(6)(C)(i) of the Act; and, for deeming the applicant a persecutor for having ordered, incited, assisted or otherwise participated in the persecution of others.

Counsel contends that contrary to the decision of the director, the immigration judge did not make a formal finding that the applicant was inadmissible under the provisions of section 212(a)(6)(C)(i) of the Act, and that the immigration judge did not find the applicant to be a persecutor or that by his activities he had ordered, incited, assisted or otherwise participated in the persecution of others. Counsel also asserts that the immigration judge did not make a finding of fraud, and that a fraud charge is not referenced in the caption of the immigration judge's decision in the applicant's removal hearing, or in her order. Counsel submits additional evidence.

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.[2]

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[1] It is noted that in her denial of the Form I-821 application, the director inserted the language and the statutory reference under the ineligibility provisions of section 208(b)(2)(A)(i) of the Act, but incorrectly stated in her conclusion that the applicant was admissible under section 208(a)(2)(A)(i) (at which, as counsel points out, does not exist) instead of under the provisions of section 208(b)(2)(A)(i) of the Act. *Decision of the Director,* dated August 31, 2011. The AAO, however, deems harmless the error referencing section 208(a)(2)(A)(i). In the denial notice the director did delineate the provisions of section 208(b)(2)(A)(i) of the Act and, it is clear that the director also based the denial decision of the TPS application (the subject of this appeal) on the provisions of section 208(b)(2)(A)(i) of the Act, and not on the provisions of section 208(a)(2)(A)(i). It is also noted that the focus of counsel's appeal addresses issues in the immigration judge's decision in the applicant's removal proceedings which relate to the provisions of sections 212(a)(6)(C)(i) and 208(b)(2)(A)(i) of the Act.

[2] 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).

The first issue in this proceeding is whether the applicant is an alien who is described in section 208(b)(2)(A) of the Act, and therefore, is ineligible for TPS.

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.

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.

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 her denial, the director deemed the applicant ineligible for TPS under section 208(b)(2)(A)(i) of the Act, for having ordered, incited, assisted or otherwise participated in the persecution of others. The director based her determination on the January 9, 2004 decision of the immigration judge in the applicant's removal hearing.

On appeal, counsel contends that contrary to the decision of the director, the immigration judge did not find the applicant to be a persecutor or that by his activities he had ordered, incited, assisted or otherwise participated in the persecution of others.

The record reflects that on his Form I-589, Application for Asylum and Withholding of Removal, the application claimed persecution in Haiti on account of his political opinion. On August 25, 1998 the applicant gave a sworn statement before an immigration officer that he had been a member of [3] and he had been involved in informing on supporters of On September 4, 1998, the applicant also testified before an asylum officer that he had been a member of for about eight months beginning in 1994, that he was an informant for , and that the individuals he informed on were Aristide supporters; and as a result of the information he provided, would arrest, jail, and beat the people he informed

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on. The record of sworn statement dated August 25, 1998, supports these statements. The sworn statement also indicated that the individuals were beaten and put in jail for a few days.

On November 16, 2001, however, the applicant submitted an amended declaration to his Form I-589, stating that in January 1994 he became a member of the [redacted] that the organization's goal was "literacy education for the illiterate; and, that it's members met every Saturday at the [redacted] school in [redacted], Haiti. The applicant further declared in the amendment that in April 1996, a member of the Haitian National Police told him that "he intended to denounce [the] group to the government as being subversive;" that he knew the same police officer to have a reputation for ruthlessness, and who had denounced other groups, and that the members of these groups had been murdered; and fearing for his life he fled Haiti in December 1997.

In his removal proceedings before the immigration judge on January 9, 2004, the applicant disavowed that he had ever been a member of [redacted]; that he had never been involved in activities with [redacted]; that the statements in his Form I-589 were false and had been inserted by the preparer of his asylum application; that the preparer had instructed him that in order to obtain employment authorization, he had to give these specific answers in his sworn statement and in his testimony before the asylum officer.

On appeal, the applicant submits affidavits from [redacted], and [redacted], attesting that they had been victims of the same preparer, [redacted] who had prepared fraudulent asylum applications for each of them and who provided false statements in support of their asylum applications, and that Mr. [redacted] had prepared several other asylum applications with similar false statements to the detriment of the asylum applicants.

The record establishes that the applicant disavowed his statements pertaining to [redacted] which he provided in connection with his asylum application. At his removal hearing, the applicant testified before the immigration judge, that the statements were false and were provided at the instruction of the preparer of his asylum application, in order to obtain an immigration benefit, namely, employment authorization. After a review of the record, including the applicant's testimony from the court transcripts of the applicant's removal proceedings wherein he disavowed his claimed involvement in [redacted], we do not find the applicant to be a persecutor or that he had engaged in activities whereby he had ordered, incited, assisted or otherwise participated in the persecution of others. We also note, as counsel contends, that the immigration judge in the applicant's removal hearing did not find the applicant to be a persecutor.[4]

[4] The IJ indicated that it was outrageous that after all these years, the applicant decided on January 9, 2004 "to fess up and admit the fraud that he committed upon the U.S. Government" in 1998. The IJ denied the applications for asylum, CAT, withholding of removal, and adjustment of status (under 245(i) of the Act).

Therefore, the director's decision that the applicant is an alien who is described in section 208(b)(2)(A) of the Act, and therefore, is ineligible for TPS, is withdrawn.

The next issue in this proceeding is whether the applicant is inadmissible under section 212(a)(6)(c)(i) of the Act for willfully misrepresenting a material fact to procure a benefit under the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
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> . . . .
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> (ii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

A misrepresentation is generally material only if by it the alien received a benefit for which he/she would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72.

As discussed, it is clear from the record, and from the applicant's own testimony before an immigration judge at his removal hearing, that the applicant willfully misrepresented a material fact pursuant to section 212(a)(6)(C)(i) of the Act, in an attempt to procure employment authorization. He admits to having made false statements in his sworn testimony before an immigration officer in support of his asylum application, and in his testimony before an asylum officer. It is also clear, contrary to counsel's contention, that the immigration judge in the applicant's removal proceedings found the applicant to have willfully misrepresented a material fact pursuant to section 212(a)(6)(C)(i) of the Act.[5]

Therefore, the applicant cannot be granted TPS at this time as he is inadmissible under section 212(a)(6)(c)(i) of the Act for willfully misrepresenting a material fact to procure a benefit under the Act.

Section 212 of the Act provides, in pertinent part, that:

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[5] The immigration judge stated, at page 6 of her oral decision, that: "The Court in this case finds that it is extremely clear that the respondent, in fact, did willfully misrepresent a material fact pursuant to Section 212(a)(6)(C)(i) of the Act

> (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

The record, however, does not reflect that a Form I-601, Application for Waiver of Grounds of Inadmissibility, has been filed. Accordingly, the case will be remanded so that the director may accord the applicant the opportunity to submit a Form I-601, pursuant to section 244(c)(2)(A)(ii) of the Act; 8 C.F.R. § 244.3(b). An adverse decision on the waiver application may be appealed to the AAO. The case will be also remanded to the director for adjudication of the TPS application regarding the applicant's continuous residence and continuous physical presence in the United States during the requisite periods. The director may request any additional evidence that she considers pertinent to assist with the determination of the applicant's eligibility for TPS. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

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