

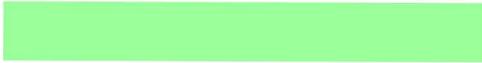


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 02 2014** 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:

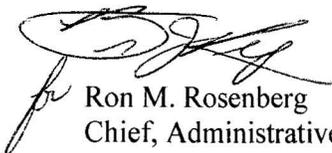


INSTRUCTIONS:

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 M. Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center and the Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The applicant filed a motion to reconsider which was dismissed. The matter is again before the AAO on a motion to reopen. The motion will be dismissed.

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 withdrew the applicant's TPS because it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others. On August 24, 2011, the AAO affirmed the director's decision. In the dismissal decision, the AAO noted that country condition information from El Rescate Database¹ indicates that during the time the applicant served in the El Salvador military (1986-1989) that the Battalion the applicant admitted he served under (ARCE Battalion), perpetrated numerous human rights violations and that the applicant's commanders, Roberto Esteban and Sergeant Machado, are known human rights violators. Based on the applicant's service under the said Battalion and his active military combat, the AAO concurred with the director that the applicant is barred from receiving TPS as a persecutor. The AAO also noted that both the Immigration Judge (IJ) and the Board of Immigration Review (BIA) found the applicant ineligible for immigration benefits in the United States because the applicant actively combated guerrilla members while he was an active member of a military group which was known to have committed serious human rights violations. The IJ determined that the applicant's service in the battalion "clearly contributed to the overall strength and dynamic of the ARCE in the 1980s which would render his participation in the military service at the time to be an action equal to a persecutor for purposes of the eligibility requirement under section 240A(b)(1)(iii) of the Act."

Once the persecutor bar attaches, the applicant has the burden of proving by a preponderance of the evidence that the persecutor bar does not apply.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In a previous motion to reconsider, counsel asserted that the AAO erred in dismissing the applicant's appeal based on an allegation that the applicant is barred as a persecutor. Counsel contended that while the applicant served in the ARCE Battalion of the Salvadoran military he had no knowledge of, nor did he participate in, activities which could be construed as ordering, inciting,

¹ <http://www.elrescate.org/about.html>

(b)(6)

assisting or otherwise participating in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

In the dismissal of the motion, the AAO noted that counsel relied on a Sixth Circuit case, *Diaz-Zanatta v. Holder*, 558 F.3d 450 (6th Cir. 2009). The court in *Diaz-Zanatta v. Holder* held that for the persecutor bar to apply, there has to be a nexus between the person's actions and the persecution of others and the person acted with scienter by having some level of prior or contemporaneous knowledge that the persecution was being conducted. Counsel likened the applicant's case to that of *Diaz-Zanatta* claiming that there is no nexus between the applicant's actions and the persecution of others, and that the applicant lacked the required scienter that persecution was being conducted.

The AAO determined that counsel's argument on motion to reconsider was not persuasive and did not satisfy the requirements of a motion to reconsider. The case cited by counsel in support of the motion to reconsider did not demonstrate that the initial decision by the director and the subsequent AAO's dismissal of the appeal were based on an incorrect application of law or USCIS policy and contrary to the evidence of record at the time of the initial decision. The applicant failed to provide pertinent precedent decisions or evidence that establish that the decision was incorrect based on the evidence of record at the time of the initial decision. The motion to reconsider was dismissed for failing to meet applicable requirements. 8 C.F.R. § 103.5(a)(4).

It has been settled by the courts and the BIA that personal involvement is not necessary for the persecutor bar to apply. In *Ofusu v. McElroy*, 98 F.3d 694, 701 (2nd Cir. 1996), the court stated that "[P]ersonal involvement in the killing or torture is *not necessary* to impose responsibility for assisting or participating in persecution." (emphasis added). The Seventh Circuit court in *Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993), cert. denied, 510 U.S. 1196 (1994) held that the atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation. See also, *Naujalis v. INS*, 240 F.3d 642 (7th Cir. 2001). And in *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988), the Board instructs the court not to "look at the subjective intent of the alien but at the objective effect of the alien's actions." The Board indicated that the proper analysis is to focus on whether the acts the alien committed amounted to assistance in persecution. It is the objective effect of the alien's action that is controlling. See *id.*, at 814-15.

On motion to reopen, counsel asserts that the applicant's membership in the ARCE battalion was involuntary as he was "drafted" into the military, and that the ARCE Battalion consisted of 500-600 men. Counsel asserts that the applicant was never involved in atrocities. According to counsel, the applicant's commander, Roberto Esteban, took a specific group with him when he went on patrols and the applicant was "always left behind guarding the towns or the camp and [the applicant] believes he was left behind because the leaders knew that it was against his nature to harm anyone or to allow anyone to be harmed." Counsel contends, therefore, that the deeds of other members or leaders should not be allocated to the applicant without proof of his personal involvement in the battalion's atrocities. Counsel submits a brief and a statement from the

applicant asking forgiveness for the accusations against him and stating that his family experiences hardship due to his absence.

Contrary to counsel's assertion on motion to reopen, in his court hearing the applicant testified that he was under the immediate supervision of Sergeant Machado and that he patrolled with him about twenty (20) times. (See, Page 60, line 10, of the Court Transcript, December 1, 2008). The motion does not contain any evidence to support counsel's assertions. The assertion of counsel does 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 was found to have participated in the persecution of others based on his active involvement in a unit of the El Salvadoran military that was known to have committed numerous human rights abuses during the period of time the applicant served in that unit. By his own admission, the applicant served in the ARCE battalion under the leadership of a notorious commander who has been cited as a known human rights violator. The applicant went out on numerous patrols with Sergeant Machado, his immediate supervisor, and his commander and his supervisor were specifically mentioned in country condition reports as known persecutors who committed human rights atrocities. The evidence in the record shows that the ARCE Battalion's indiscriminate attacks involved innocent civilians in several villages based on their perceived political opinion – guerilla sympathizers. Based on the evidence of record – the applicant's own sworn testimony and country condition information, the applicant falls within the group of aliens described in sections 208(b)(2)(A) and 212(a)(3)(E)(iii) of the Act. He is barred from receiving TPS in the United States. The applicant failed to establish by a preponderance of the evidence that the persecutor bar does not apply to him.

The applicant failed to establish new facts in support of the motion to reopen and failed to submit supporting affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The applicant also failed to provide any reasons for reconsideration that are supported by pertinent precedent decisions to establish that the AAO's prior decisions were based on an incorrect application of law or USCIS policy. The applicant failed to provide pertinent precedent decisions or evidence that establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

As the motion to reopen does not meet applicable requirements it is dismissed. 8 C.F.R. § 103.5(a)(4). The burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The motion is dismissed. The previous decisions of the AAO, dated August 24, 2011, and March 20, 2013, are affirmed.