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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: NEWARK, NEW JERSEY

Date: **MAY 05 2010**

IN RE:

[Redacted]

APPLICATION:

Application for Adjust Status to Permanent Residence under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255.

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Newark, New Jersey. The field office director certified the decision to the Administrative Appeals Office (AAO) for review. The field office director's decision will be affirmed.

The applicant is a native and citizen of El Salvador who is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen brother on January 13, 1995. The Form I-130 was approved October 10, 1995 with a priority date of January 13, 1995. The applicant seeks to adjust his status to that of a permanent resident pursuant to section 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255 pursuant to the approved Form I-130.

The record provides the following facts and procedural history. The applicant filed a Form I-589, Application for Asylum and Withholding of Deportation, on June 12, 1995.¹ He was interviewed regarding the asylum application on June 19, 2003 and again on February 13, 2008. A Notice of Intent to Deny (NOID) the asylum application was issued to the applicant on February 27, 2008. A rebuttal to the NOID dated March 6, 2008 is also in the file. The record also includes the applicant's December 27, 1999 Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105-100 (NACARA)). The applicant was again interviewed on October 6, 2008. On April 29, 2008, the applicant was notified that his NACARA application had been referred to an Immigration Judge for a decision. On June 24, 2008, the Immigration Judge terminated removal proceedings so that United States Citizenship and Immigration Services (USCIS) could consider the applicant's Form I-485 application filed for permanent resident status under section 245(i), based on an approved Form I-130 visa petition filed by the applicant's brother. On July 21, 2009, the field office director denied the Form I-485, as a matter of discretion, after considering positive and negative factors regarding the applicant's history in El Salvador and the United States. The field office director certified her decision to the AAO for review.

USCIS records show that the applicant entered the United States on August 8, 1977 and was deported on August 16, 1977; entered the United States on January 25, 1978 and was deported on September 26, 1978; entered the United States on March 13, 1980, filed a Form I-589, and was deported on September 25, 1982; and entered the United States again on January 21, 1990.

The issue in this matter revolves around the applicant's representations to USCIS regarding his activities while in El Salvador between 1982 and 1990. The field office director found the applicant's statements in his Form I-589 June 19, 2003 interview were not credible and that the applicant's lack of credibility is such a significant negative factor that the applicant is precluded from adjusting his status. Prior to discussing the negative factor(s) in this matter, the AAO observes that the applicant has presented the following positive factors that must be weighed against any negative factor(s): the applicant does not have a criminal record in the United States; the applicant

¹ The record also includes a Form I-589, filed in 1981. The Form I-589 includes information that appears to relate to the applicant, such as the name of his wife, but includes a slightly different date of birth, May 18, 1946 not May 8, 1946 and a different A number [REDACTED]. The 1981 Form I-589 was denied and the applicant was placed in immigration proceedings on or around April 13, 1981.

has been married to a lawful permanent resident of the United States since 1973; the applicant is the father of four children who are lawful permanent residents of the United States; and the applicant is the beneficiary of an approved Form I-130, filed by the applicant's brother, a United States citizen.

On the 1995 Form I-589, the applicant indicated that he was an official commander in the Salvadoran Army since June 1989 and that his army patrol fought many times with the guerrilla rebel groups. At his June 19, 2003 interview with an asylum officer, he indicated that this statement on the Form I-589 was untrue and that he had been told to write down this information as it was good to say that he fought against the guerrillas. In a contemporaneous write-up of that interview also dated June 19, 2003, the asylum officer noted that the applicant had made the following statements: that he was first commander for the second unit in the village of Las Cruces; that he received training in how to recruit people into the military; that he was trained and stationed in the area of Las Cruces, [sic] Department of La Union and that his commanding officer was Commander [REDACTED] the city of Yucuaiguin; and that the applicant had 12 people under his command and their duty was to recruit people for the military or report them to the office of Commander [REDACTED] if they refused to join the military at which point Commander [REDACTED] would send a group to arrest those who refused to join the military. The write-up of the June 19, 2003 interview also indicated that the applicant stated that his orders were to arrest three people every week and that although he did not follow those orders, his unit did arrest and interrogate people before surrendering them to the head office. According to the write-up, the applicant also stated that he had never engaged in battle and he used a rifle for target shooting only. The asylum officer concluded in the write-up that it seemed unlikely that the applicant who served six years in a conflictive area (Yucuaiguin where La Union borders both [REDACTED] and [REDACTED] departments) did not engage in battles. The asylum officer also concluded in the write-up that the applicant was not credible with respect to his inconsistent and vague testimony denying knowledge of human rights abuses as the applicant was in areas where human rights abuses took place.

In a February 13, 2008 interview with an asylum officer in conjunction with his asylum application, the applicant stated that he had been to the United States three times, in 1977 and had been deported, had entered again in 1978 to 1982, and again from January 1990 to 2003. In response to being asked if he had been in the Salvadoran military, the applicant indicated he had been in the civil patrol. The applicant also stated that he had not harmed anyone.

In a February 27, 2008 NOID, the asylum office director notified the applicant that he had "presented testimony that was believable, consistent, and sufficiently detailed" and thus was found credible. The asylum office director noted that the applicant had not presented evidence of eligibility for asylum and further observed that based on the applicant's experience with the civil patrol, the applicant may possibly be barred from obtaining asylum under 8 C.F.R. 208.13(c)(2)(i)(E) as someone who "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 the applicant's March 6, 2008 rebuttal to the asylum director's NOID, the applicant through counsel noted the asylum director's finding that the applicant was credible and asserted that the credible and consistent version of the facts supported the applicant's statements that he was assigned

to the civil patrol of Yucuaiquin around 1987 to locate potential conscripts between the ages of 18 to 30 and ascertain whether or not they had complied with the selective service laws of El Salvador and that if the potential conscripts were non-compliant, the civil patrol would detain the individual and transport him to the military headquarters at Yucuaiquin for processing and enrollment. Counsel contended that enforcement of Salvadoran selective service laws should not be viewed as forced recruitment arising to the level of someone who "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 a subsequent interview, dated October 6, 2008, the applicant stated that he was a commander in the civil patrol in 1987 and prior to that had been a member of the civil patrol in 1985, 1986, and 1987. The applicant stated that his responsibility in the civil patrol was to take care of the community and when a citizen had to go to the military, he had to get them to the military. The applicant reiterated that he had never harmed anyone.

The record further included photocopies of the applicant's army identification. One photocopy shows the applicant's picture in the left hand bottom corner of the identification with a seal covering a small portion of the applicant's picture. The photocopy shows the identification card was valid June 30, 1987 and identifies the applicant as a first commander. A second photocopy of the army identification card includes images of both the front and the back of the card. This iteration of the identification card shows the applicant's picture and seal in the center to left bottom of the identification. The applicant's picture is inside the seal. The images of the cards are clearly different and raise questions regarding the authenticity of the card. When asked about the inconsistent images, the applicant indicated he no longer had the card and did not know why his photograph on the card appeared in two different places.

As observed above, the field office director found that the applicant's statements in the June 19, 2003 asylum interview were not credible, specifically that the applicant in his sworn testimony denied knowledge of any human rights violations committed by the civil patrol during his six-year tenure. The field office director found this specific denial far outweighed the positive factors presented by the applicant and did not warrant a favorable exercise of discretion.

In response to the certification notice, counsel for the applicant correctly points out that the Newark Asylum Office in the February 27, 2008 NOID, notified the applicant that he had "presented testimony that was believable, consistent, and sufficiently detailed" and thus was found credible. Counsel notes that the April 29, 2008 decision denying the applicant's asylum claim was based on a conclusion that the applicant had not presented evidence establishing a well-founded fear of persecution, not on the applicant's lack of credibility. Counsel asserts that the credibility determination made by the Newark Asylum Office as set forth in the February 27, 2008 NOID should have been given great deference by the field office director when considering whether to exercise discretion favorably on behalf of the applicant. Counsel cites *Jishiashvili v Attorney General of the United States*, 402 F. 3rd 386 (U.S. Court of Appeals, 3rd Circuit 2005), a decision wherein the court recognized that an immigration judge's evaluation of an applicant should be given great deference by the appellate court because the immigration judge had opportunity to observe the applicant as he gives his testimony. Counsel also reiterated that it is not persecutory for a country to

require military service of its citizens and that the field office director improperly imputed impermissible conduct by the applicant based on unidentified Department of State reports.

On certification, the AAO finds that the asylum officer's contemporaneous write-up of the June 19, 2003 interview reflects the most accurate finding of the Newark Asylum Office regarding the applicant's credibility. The AAO finds the statement set forth in the February 27, 2008 NOID, some five years subsequent to the June 19, 2003 interview that the applicant was found credible, is a statement that should not be given great weight or deference. The AAO also finds that the applicant's submission of an obviously altered identification card regarding his tenure in the Salvadoran civil patrol impugns the applicant's credibility. The information in the record is insufficient to support a finding that the applicant's actions in El Salvador between 1982 and 1990 involved the persecution of others; however, the applicant's generally vague testimony regarding his activities with the civil patrol and the events occurring in El Salvador when he was there, the applicant's willingness to include information on a Form I-589 that was untrue in an effort to obtain asylum, and the submission of an altered document raises significant questions regarding the veracity of the applicant. In addition, the applicant indicated on the 1995 Form I-589 that he had not previously applied for asylum; however the record reflects that the applicant filed for asylum and was placed in proceedings before an Immigration Judge in 1981.

Section 245 of the Act provides in pertinent part:

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) . . . may be adjusted by the Attorney General, *in his discretion* and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

(Emphasis added).

Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility. *Matter of Marques*, 16 I. & N. Dec. 314, 315 (BIA 1977). The applicant has the burden of demonstrating that discretion should be exercised in his favor. *Matter of Patel*, 17 I. & N. Dec. 597, 601 (BIA 1980); *see also Matter of Leung*, 16 I. & N. Dec. 12 (BIA 1976), *Matter of Arai*, 13 I. & N. Dec. 494 (BIA 1970). Where adverse factors are present, it may be necessary for the applicant to offset those factors by a showing of unusual or even outstanding equities. *Matter of Arai*, 13 I. & N. Dec. at 496. Favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administrative

discretion. *Id.* As discussed above, there is sufficient evidence in the record to consider the applicant's testimony and actions when requesting immigration relief suspect and thus an adverse factor. Although the applicant has submitted evidence of several positive factors, the evidence also shows that the applicant has not been forthcoming regarding his activities in El Salvador and has not shown regard for the immigration laws of the United States.

The AAO concurs with the field office director that the applicant has not demonstrated "unusual or even outstanding equities" that outweigh the adverse factors present in this case.

In proceedings for adjustment of status under section 245 of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the field office director's decision denying the application will be affirmed.

ORDER: The field office director's decision is affirmed.