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FILE: [REDACTED] Office: SAN DIEGO Date:
[WAC 01 277 56023]

AUG 26 2005

IN RE: Applicant: [REDACTED]

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

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.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Diego, and is now before the Administrative Appeals Office on appeal. The appeal 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 determined that the applicant is statutorily ineligible for TPS under section 244a(c)(2)(B)(ii) of the Act because he ordered, incited, assisted, or otherwise participated in the persecution of persons on account of race, religion, nationality, membership in a particular social group, or political opinion.

On appeal, counsel submits a statement.

An alien shall not be eligible for TPS if the Secretary of the Department of Homeland Security (or if in immigration proceedings, the Attorney General) finds that 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. *See* INA § 244(c)(2)(B)(ii), referring to INA § 208(b)(2)(A)(i), as amended.

The record indicates that the applicant was apprehended by the United States Border Patrol on October 22, 1999, at a Greyhound Bus Station in Indio, California. The applicant told the apprehending officers that he entered the United States without inspection near Calexico, California, on or about March 15, 1995. He stated that he had been working in the lettuce fields near Salinas, California. The applicant was released on his own recognizance and served with a Form I-862, Notice to Appear, instructing him to appear for a removal hearing before an Immigration Judge in Imperial, California, at a date and time to be determined.

On February 10, 2000, the applicant filed a Form I-589, Application for Asylum and for Withholding of Removal. The applicant claimed that he was afraid that if he were to be returned to his country, he would be targeted for persecution and torture because he had belonged to the military and because of his "political opinions."

The applicant appeared before an Immigration Judge in Imperial, California, on June 2, 2000, for his removal proceeding. The following applications were also under consideration: termination of removal proceedings; asylum and withholding of removal; and, protection under the Convention Against Torture. In his hearing, the applicant conceded that he entered the United States without inspection, but stated that he had actually entered the United States in 1989, not in March 1995, as indicated in the notice to appear. The Immigration Judge found the applicant removable because he was an alien present in the United States without having been properly admitted or paroled, and ordered the applicant to be removed to El Salvador.

The Immigration Judge stated that the applicant had filed an application for suspension of deportation under the Nicaraguan Adjustment and Central American Relief Act (NACARA), but the applicant ultimately withdrew the application after admitting that he did not meet the requirements for that form of relief.

The Immigration Judge further found the applicant to be barred from asylum because he had not filed his asylum application within a year of his entry into the United States in 1989 or within one year of April 1, 1997,

whichever came later. As previously stated, the applicant did not file his asylum application until February 10, 2000.

The record contains a transcript of the applicant's removal hearing. The applicant testified under oath, in pertinent part, as follows:

Q. Well, was it your plan to come to the U.S. when you left El Salvador?

A. Yes, in that I was afraid to remain back there.

Q. What . . . was your occupation in, in El Salvador?

A. Well, from '86 to '89, the only thing I did was remain. . .with the army.

Q. Okay. Did, did you hold a position in the army?

A. At the very beginning I was just a private, and then afterwards I became a, like a commander, assistant.

* * *

Q. Okay. How long were you a second assistant to the commander?

A. Like about a year and a half?

Q. And then after that did you, were you promoted to something else?

A. Well, actually, see, the thing of it is they would send us out to carry out unjust, you know, duties, and there was innocent people and I just didn't have the courage to . . . perform those kinds of duties. And so, then afterwards, I deserted. . ., but they were. . . looking for me for a while.

* * *

Q. So, after the second commander position, did you get promoted to something else?

A. Yes. Actually what happened was the first commander. . . they called him over, because. . . they were claiming that he himself was against the government as well. But he had just disappeared. And then when they called me to more or less replace him, that's when I . . . didn't want to do that. I didn't go back, and I just deserted and took off.

* * *

Q. What, what would be involved in the position of a[n] assistant commander?

A. [W]hen the first commander. . . was busy, . . . then I'd be the one in charge. I . . . would take his place.

Q. And you be in charge of who[m]?

A. The 20 of us that were out.

* * *

Now, so, what problems did you have being a second commander?

A. Well, first, a brother of mine got killed.

Q. Who killed him?

A. And also a cousin.

Q. Who killed your brother?

A. The guerrilla.

Q. Okay. And the cousin?

A. The same.

A. Okay. Why was he killed by the guerrillas? Well, were they killed by the guerrillas?

A. Well, in other words, . . . the government would send. . . us out. . . in a . . . mission to . . . exchange bullets and, . . . so that's where he got killed.

Q. To exchange bullets with who[m]?

A. Yes. That's the reason I became scared and I didn't, on the second occasion when they wanted to send us out, I didn't really want to go.

Q. So, the government would send you out to, to where?

A. In other words, to go about and shoot innocent people, like guerrillas.

Q. Wait. I don't understand. Innocent people, the guerrillas.

- A. Yes, the guerrillas.
- Q. So, w[as] this combat? Would you go out and, and have a fight with the guerrillas?
And --
- A. Yes.
- Q. -- you would shoot at them and they would shoot at you?
- A. Yes. Yes, in, in fact, some, at other times they would come over and, and start shooting at us.
- Q. And so was your brother killed in. . . combat?
- A. Yes.
- Q. Was he a member of the armed forces?
- A. Yes.
- Q. And was your cousin. . . was just a soldier?
- A. Yes.
- Q. And was he killed in combat?
- A. Yes, in, in, during combat, yes.
- Q. And so, when you said you had to go out and shoot innocent people, were you meaning you had to shoot at guerrillas . . . engaged in combat?
- A. Yes, in the sense that, in the sense that they would depart, take off, and then the people remaining would be the innocent people.
- Q. And so, you would have to shoot the innocent people?
- A. Yes, . . . that was one of the orders from the colonel that. . . the boss would tell us to do.
- Q. All right. I. . . don't understand exactly what you mean. When. . . you had to go shoot innocent people, where did you go?

A. [T]he government sent us out after the guerrillas, but they would find out previous to that about us doing that, so they would take off and the people that would remain there, those are the innocent people that got bombed and then shot at. . . based on . . . the officer's orders.

* * *

Q. And when the government sent you out, would they send you out to fight the guerrillas in the mountains or hills or where?

A. To the hills, . . . up in the mountains.

* * *

Q. And so, when you would go to the, to the, hills and the mountains, the people that you'd be fighting against would be the guerrillas?

A. Yeah, we, we would go up towards the hills, but those kind of people that we were fighting up in the hills were people that were actually not associated to any particular army or any particular guerrilla group. They were just, these are just armed people. . . . See, the thing of it is, these kind of people are the type of people that really didn't belong because they didn't belong to the government. The government figured well, they're contras, and. . . against the government. Then the, the contras, the guerrilla fighters would do the same thing. They. . . would . . . consider them as part of the government. And I really don't know what . . . their political stand actually was, but they would send us to fight these people.

* * *

Q. You've told me that these were people caught in the middle. The government thought they were rebels, the rebels thought they were government. How did you know that?

* * *

A. Well, the people themselves, they would claim that when we would. . . capture them they would claim that because they would . . . tell us that if they. . . refused to take food for them, that they would get killed.

Q. And so, . . . did you kill these people or capture them?

A. Well, yes, we captured them. But others. . . would shoot and they would get shot at.

* * *

Q. Did you go out on patrol with your unit to round up these innocent people?

A. Yes, but not, we wouldn't go out every day, just once in a while.

Q., So, how often did you go out to round up these innocent people?

A. Well, like about once a month. . .

Q. How many times did you encounter them?

A. Like about twice.

Q. And did you shoot at innocent people?

A. Yes, . . . as far as shooting's concerned, I did partake in, in shooting, but I didn't hit anything. And --

* * *

Q Were you ever present when people were arrested in these patrols, innocent people, as you've described them?

A. Well, once, just once we took a few over, you know, to the headquarters of the compound, and the colonel's the one that was in charge of figuring what was going to happen to them.

Q. And what happened to them?

A. I have no idea what. . . could have happened to them.

* * *

+Q. So, was it your understanding that the colonel would just interview them and let them go?

A. Well, actually, maybe, perhaps more proper that maybe he, he would actually shoot, kill them. . .

Q. Well, why did you participate in this treatment of innocent people?

A. No, in other words, government would order us, you know, to go out and, and, and do a certain kind of patrols, and if you find them, you bring them to us. But --

Q. So, you were just following orders?

A. But . . . only twice. . . .

Q. And . . . you've explained to me that these were people who were innocent. They had no particular allegiance to the government or to the contras, but that the government suspected them of being guerrillas and that that was the reason you were sent on patrol. . .

A. Yes.

Q. And you knew that when you went out on patrol?

A. Well, that was based on the memo that the colonel would send us . . . claiming that they were assisting them.

Judge to Mr. [REDACTED]

Q. You started from the lofty position, Mr. [REDACTED] that you left because you were asked to . . . do things that you could not do to innocent people, but by the end of the story, it turns out you did. And I think that in the circumstances, you are barred from protection by way of withholding because you have participated in persecution. You rounded up people who you knew to be innocent people, to whom your commanders had attributed a political view, and you were present, you shot at them. The fact that you didn't kill one is not a real virtue. You, nevertheless, participated in their persecution, and you are barred.

A. Yes.

The Immigration Judge also found that the applicant was ineligible for withholding of removal under the provision of section 241(b)(3)(B)(i) of the Act because he had ordered, incited, assisted, or otherwise participated in persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. The Immigration Judge stated in his order:

In this case, the respondent's credibility has been difficult to gauge. Ultimately, I find that his initial testimony was obviously an effort to insulate himself from the extent of his own involvement in the atrocities which he initially raised as the reason for his own departure from El Salvador. Respondent testified that he had been a soldier in the army in El Salvador. After a service of about two years, he was promoted to second commander. Ultimately, when he was at this high rank, his unit of 20 men was directed to go into the countryside and to round up, and to shoot at and to kill, persons the respondent himself testified were "innocent." The

respondent explained that these “innocent” people were actually persons who preferred to remain neutral in the struggle between the El Salvador government and the guerillas. . . .

The respondent initially testified that he left El Salvador, deserted from the armed forces, because he did not want to participate in the rounding up of these innocent people. At one point in his testimony, he told me that he had never seen these people rounded up. He said he had never participated in the rounding up of these people. He said simply he learned of this from the reports that his own commander gave to him.

Later, the respondent relented. He said that he had himself participated in patrols which rounded up these people. . . . Nevertheless, he explained that on at least two occasions he participated in a patrol which not only encountered these people, but engaged in an exchange of gunfire. The respondent himself said he shot at some of these people. He said he did not kill anybody. He also explained that he was present when persons were apprehended and were, ultimately, turned over to a colonel. While he said he did not really know what happened to people who fell into the colonel’s clutches, he later opined that those people might be killed.

Certainly, the respondent was a knowing participant in the persecution of others in his home country. His moral pangs came too late. He was not so outraged at the beginning of that enterprise to resist. Rather, he chose to follow orders. However, as civilized nations made plain at Nuremberg, simply following orders in the persecution of others is no defense. That the respondent ceased to participate only after two incidents is . . . no defense. He is a persecutor of others. Those “innocent people” were people to whom his government and army had attributed a specific political view which the (the army and the government) wanted to suppress. The respondent is, therefore, ineligible for withholding of removal.

Finally, the Immigration Judge also determined that the applicant had not established that it was more likely than not that he would be tortured when he returned to El Salvador. The Immigration Judge, therefore, found that the applicant was ineligible for protection under the Convention Against Torture.

The applicant subsequently appealed the matter to the Board of Immigration Appeals (BIA). On June 26, 2001, the BIA administratively closed the proceeding to enable the applicant to apply for Temporary Protected Status.¹

The applicant filed his TPS application on August 17, 2001.

The district director, San Diego, denied the TPS application on July 8, 2004, because the applicant is ineligible for TPS under section 244a(c)(2)(B)(ii) of the Act.

¹ The AAO finds the BIA’s administrative closure to allow the applicant to apply for TPS, in spite of Service Counsel’s admonition, to have been in error; a finding that an alien has perpetrated persecution renders the alien statutorily ineligible for TPS.

On appeal, counsel contends that the evidence does not support the director's finding that the applicant is statutorily ineligible for TPS. Counsel further contends that the district director denied the applicant a "full and fair hearing" on his TPS application. Counsel asserts that the district director's finding is not consistent with the standards of eligibility set forth at 8 C.F.R. §§ 244.2, 244.3, and 244.4. Counsel states that the director did not inform the applicant of the evidence relied on to make the finding of ineligibility or permit the applicant to review the record of proceeding.

As to counsel's assertion that the applicant was not provided with a copy of the evidence upon which the director relied to make a finding of ineligibility, it is noted that the applicant was present at his removal hearing and was fully aware of the finding of the Immigration Judge. It is further noted that counsel has subsequently been provided with a copy of the record of proceeding pursuant to a Freedom of Information Act (FOIA) request.

Counsel further asserts that the district director's finding is not consistent with the standards of eligibility set forth at 8 C.F.R. §§ 244.2, 244.3, and 244.4. In this case, however, it has been determined by an Immigration Judge that the applicant was an alien who ordered, incited, assisted, or otherwise participated in the persecution of persons on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* section 208(b)(2)(A) of the Act. Therefore, he is ineligible for TPS under section 244a(c)(2)(B)(ii) of the Act.

Although counsel has advanced various arguments, he has not provided any evidence to overcome the ground for the denial of the petition. Consequently, the director's decision to deny the application for temporary protected status will be affirmed.

An alien applying for temporary protected status 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.