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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



M1

Date: Office: VERMONT SERVICE CENTER

FILE: [REDACTED]
[REDACTED] and
[REDACTED]
consolidated herein]
[REDACTED]

JUN 28 2011

IN RE: Applicant: [REDACTED]

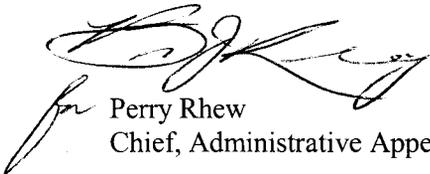
APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

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.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center (VSC). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The director's decision will be withdrawn, and the case remanded for the purpose of obtaining updated fingerprints from the applicant.

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 denied the application on the ground that the applicant was ineligible for TPS because he ordered, incited, assisted or otherwise participated in the persecution of fellow citizens in El Salvador.

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 8 CFR. § 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4;
- (f)
 - (1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the FEDERAL REGISTER, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:
 - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for reparole; or

- (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

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 of Homeland Security (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) [which authorizes the granting of asylum] 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.

The applicant filed his application for TPS (Form I-821) on May 12, 2008.

On April 8, 2010, the VSC director issued a decision denying the application. While finding that the applicant met the requirements for TPS set forth at 8 C.F.R. § 244.2(a), (b), (c), (f) and (g), he determined that the applicant was ineligible for TPS on the ground that the evidence indicated he had committed persecutory acts within the meaning of sections 244(c)(2)(B)(ii) and 208(b)(2)(A)(i) of the Act. The director cited evidence in the record (the applicant's asylum application, Form I-589, filed in August 1995) that the applicant had served in the El Salvadoran National Guard for two years during the 1980s. The director indicated that it "appear[ed]" the applicant served near San Miguel where the National Guard, according to other sources, participated in persecutory acts against guerrillas and/or civilians. This evidence, the director pointed out, was inconsistent with the applicant's testimony at his asylum interview (on February 11, 2008), at which he denied having ever served in the El Salvadoran military or police. In the director's view, the conflicting information provided by the applicant on his asylum application in 1995 and at his asylum interview in 2008 undermined his overall credibility, and necessitated the denial of his application for TPS.

On appeal, counsel asserts that the director's decision was erroneous because there is no objective evidence that the applicant was involved in any persecutory acts. On the asylum application in 1995 the applicant merely stated that he was in the Army for two years, one of which was 1986, and that his service was in the National Guard. (The applicant did not distinguish between the two.) He also stated on his asylum application that the guerrillas were hunting for him, killed his brother by mistake, and tortured his father. At his asylum interview in 2008, counsel contends, the applicant's testimony that he never served in the El Salvadoran military or police was a correction of the conflicting statements on his earlier asylum application, which counsel states was completed by someone else on the applicant's behalf. Even if it could be established that the applicant had been a member of the National Guard in or around San Miguel in 1986, and that the National Guard

committed acts of persecution at that time, counsel maintains that there is no evidence linking the applicant personally to any such acts.

Counsel also notes that the Asylum Office Director in Arlington, Virginia, in the Notice of Intent to Deny (NOID) which she sent the applicant on February 12, 2008, did not mention persecutory acts as a ground for denying his application for asylum. Rather, the NOID cited the applicant's testimony about his efforts to avoid service in the El Salvadoran military, that he fled El Salvador for the United States to avoid being forced to serve on either side in the civil war, and that he no longer feared returning to El Salvador because the war was over. The NOID concluded that the applicant did not have a well-founded fear of future persecution if he returned to El Salvador, and thus was not eligible for asylum in the United States. A month later, on March 12, 2008, the application for asylum was denied for the reasons described in the NOID. Thus, the denial of asylum to the applicant was not based on a finding that he committed persecutory acts.

Upon review of the entire record, the AAO agrees with counsel's argument that the applicant's participation in persecutory activities has not been established in this case. 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 . . ." There is no evidence whatsoever, and the government does not assert, that the applicant "ordered" or "incited" any persecutory activities. While "assist[ing] or otherwise participat[ing]" in persecutory activities would require less direct involvement by the applicant, there is also no specific information in the record to link the applicant to persecutory activities at this more attenuated level. The VSC director imputed persecutory acts to the applicant by virtue of his supposed service in the National Guard near San Miguel, El Salvador. But the director did not identify the source(s) of his information that the National Guard committed persecutory acts, did not describe those persecutory acts, and did not identify any particular persecutory acts in which the applicant was involved, either directly or tangentially. The applicant has been consistent over the years – in all of his applications and interviews with the legacy Immigration and Naturalization Service (INS), the Executive Office of Immigration Review (EOIR) in the Department of Justice, and U.S. Citizenship and Immigration Services (USCIS) – in denying that he committed, assisted, or otherwise participated in any persecutory acts.

It is true, as the VSC director pointed out in his decision, that the applicant provided conflicting information about his service in the El Salvadoran Army or National Guard – acknowledging in his 1995 asylum application that he served for two years during the 1980s, and then denying that he had any such service at his 1998 asylum interview. In a letter to the Asylum Office, dated May 27, 2006, the applicant suggested that the information on his asylum application about military service may have been added in error by the person who prepared his application (identified by the applicant in his asylum interview as a "notario"). Even if the AAO were not entirely convinced by this theory, the record includes one other document which adds credibility to the applicant's claim that he never served in the El Salvadoran Army or National Guard. That document is the applicant's Cedula (national identity card), issued by El Salvadoran authorities to the applicant on May 21, 1987, which records that he had no military service. Three months later, in August 1987, the applicant entered the United States illegally from Mexico and was arrested by the U.S. Border Patrol in Texas. There is no evidence in the record that the applicant ever served in the military after that time.

Based on the foregoing analysis of the evidence, the AAO concludes that the record does not establish that the applicant ever served in the El Salvadoran Army or National Guard. Combined with the lack of evidence that the applicant "ordered, incited, assisted or otherwise participated" in any persecutory acts, the AAO determines that the applicant is not ineligible for TPS under sections 244(c)(2)(B)(ii) and 208(b)(2)(A)(i) of the Act. Accordingly, the VSC director's decision of April 8, 2010, will be withdrawn.

The AAO agrees with the VSC director's findings that the applicant meets the requirements for TPS set forth at 8 C.F.R. § 244.2(a), (b), (c), (f) and (g). The record does not indicate any other grounds that would bar the applicant from receiving TPS. However, the validity period of the applicant's fingerprint check has expired.

Accordingly, the case is remanded for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. Thereafter, the director will render a new decision. Should the decision be adverse, the director must give written notice setting forth the specific reasons for the denial pursuant to 8 C.F.R. § 103.3(a)(1)(i), and the applicant shall be permitted to file an appeal without fee.

An alien applying for TPS has the burden of proving that he or she meets the requirements and is otherwise eligible for TPS under the provisions of section 244 of the Act.

ORDER: The decision of the VSC director, dated April 8, 2010, is withdrawn. The application is remanded to the VSC director for the purpose of sending the applicant a fingerprint notification and affording him the opportunity to comply with its requirements. The director will then issue a new decision. Should that decision be adverse, the applicant shall be permitted to file an appeal without fee.