

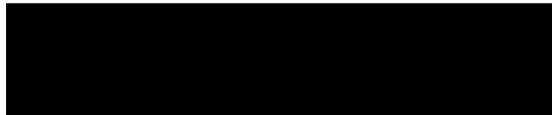
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



M₁

DATE: FEB 08 2012 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. § 1254

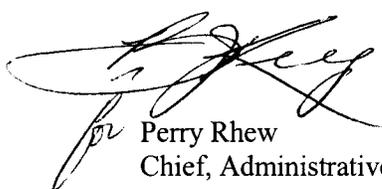
ON BEHALF OF APPLICANT:


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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the Vermont Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The application 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 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 because it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others.

On appeal, counsel asserts that the applicant's response to the director's notice only shows that the applicant was a member of the El Salvadoran military and that he had engaged in activities directly related to "on-the-battlefield-conflict" of the type that are "inherent in a civil war." Counsel citing federal case laws including *Matter of Rodriguez-Majano*, 19 I&N Dec. 811 at 814-815 (BIA 1988), and *Xu Sheng Gao, v. U.S. Atty. Gen.*, 500 F.3d 93, (2d Cir. 2007), asserts that as a matter of law, military involvement and the [REDACTED] Database do not trigger the persecutor bar against the applicant.

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 section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record reflects that the applicant's Form I-589, Application for Asylum and Withholding of Removal, was filed on February 17, 2000. On his Form I-589, the applicant indicated that he served in the El Salvador military from 1984 to 1986. The applicant indicated that he was the company commander for Fifth Brigade Infantry and attained the rank of sergeant. The applicant indicated that he was also a troop instructor on military tactics.

On his TPS application, the applicant answered "no" to the questions at Part 4, items 2p, "[h]ave you EVER ordered, incited, called for, committed, assisted, helped with or otherwise participated in: (ii) killing any person?: and (iii) intentionally and severely injuring any person?" The applicant provided a statement indicating that he served two years in the El Salvador military, and asserted, in pertinent part:

During my second two months of service, I left the barracks and went out on patrols. In the course of these patrols, I was fired upon by the communists and returned their fired. However, after this two month period, my government decided that I was more valuable as a trainer than as a fighter. So for the rest of my tour of duty, which was about another twenty months, my sole job was to teach newly drafted men how to be good soldiers. For example, I taught them never to hurt an enemy combatant who was trying to surrender as well as how to properly take apart and reassemble their weapons. I did not shoot at any person for this twenty month period.

In the course of the two months after I completed my training and before I became a trainer myself, I discharged my rifle in the general direction of gunfire aimed at me and my fellow soldiers. It is possible that in doing so, my bullets killed or severely injured one or more members of the enemy force. However, I never saw the individuals with whom I was exchanging fire, because we shot at one another from long distance, and also tried not to be seen. Given these circumstances, it seems to me unlikely that any of my bullets ever hit anybody. On the other hand, these same circumstances also make it impossible for me to know with certainty that I didn't kill or severely injure a person.

On his TPS application, the applicant answered "yes" to the questions, at Part 4, items: 1) 2q(i), "[h]ave you EVER served in, been a member of, assisted in or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, militia, or insurgent organization?"; 2) 2r, "[h]ave you EVER been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons used any type of weapon against any person or threatened to do so?"; and 3) 2t, "[h]ave you ever received any type of military, paramilitary, or weapons training?"

In his statement, the applicant asserted that in the course of fulfilling his military obligations, he spent no more than ten percent of his time using weapons against enemy combatants. The applicant asserted:

In other words, during the preponderance of my service, I did not engage in such activity. Rather, my duties involved training newly drafted men how to be good soldiers. Before I was promoted to this training position, I myself received military training primarily from the Americans whom the United States sent to El Salvador to support the government.

In issuing his decision on June 30, 2010, the director noted that according to the [REDACTED], country conditions indicate that during the timeframe that the applicant served, the El Salvadoran army perpetrated numerous human rights violations. The director determined that in light of the country conditions provided by the [REDACTED], it appeared unlikely that the applicant was not aware of and/or did not participate in persecutory acts from 1984 to 1986.

When determining whether the persecutor bar applies in a given case, the court must look beyond the mere objective effects of an applicant's actions and analyze whether the applicant had *scienter*, or knowledge of wrongdoing. *Xu Sheng Gao v. U.S. Atty. Gen.*, 500 F.3d 93, 102-03 (2d Cir. 2007). The "persecutor bar requires some level of culpable knowledge that the consequences of one's actions would assist in acts of persecution," although the evidence need not show that the alleged persecutor had "specific actual knowledge" that his actions assisted in a particular act of persecution. *Id* at 103.

The Board of Immigration Appeals 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. *Matter of Rodriguez-Mejano*, 19 I&N Dec. 811, 814-15 (BIA 1988).

While the [REDACTED] has been cited as evidence that persecutory acts were committed by the El Salvadoran army, it did not specifically link the applicant or his unit to these acts. Therefore, the applicant's membership in the El Salvadoran military is insufficient, by itself, to invoke the persecutor bar. 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 in the record that the applicant had been actively or directly involved in any persecutory activities. While "assist[ing] or other partipat[ing]" in persecutory activities would require less direct involvement by the applicant, there is no evidence to link the applicant to persecutory activities, at this more attenuated level.

In the instant case, there is no evidence that the applicant personally "assisted or otherwise participated" in any persecutory activities. To reach such a conclusion would be through a guilty by association link to the army in which he served, which has been cited as committing such abuses. However, this would not fall within the purview of section 208(b)(2)(A)(i) of the Act.

Accordingly, the director's decision to deny TPS based on ineligibility under section 208(b)(2)(A)(i) of the Act will be withdrawn.

Finally, the record reflects that the applicant's Form I-589 was denied and he was ordered removed from the United States on August 15, 2000. No appeal was filed from the decision of the immigration judge. While the applicant's initial TPS application () was filed during the initial registration period, it was denied due to abandonment on November 20, 2001. No motion was filed from the denial of the initial TPS application.¹ The applicant filed his current TPS application subsequent to the registration period. Therefore, it must be determined if during the initial registration period (March 9, 2001 through September 9, 2002), the applicant fell within at least one of the provisions for late registration described in 8 C.F.R. § 244.2(f)(2)(i) through (iv). The issue of late registration eligibility was not addressed by the director in his decision.

Therefore, the case will be remanded to the director for further adjudication of the application. The director may request any additional evidence that he 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.

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

¹ A denial due to abandonment may not be appealed, but an applicant may file a motion to reopen. 8 C.F.R. § 103.2(b)(15).