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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

[redacted]

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DATE: MAR 26 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

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,

for 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 on appeal. The case will be remanded for further 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 for the applicant argues that the decision to deny the application is a gross error and ignorance of procedural law, substantive law, precedence, as well as facts.

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 applicant testified to an Asylum Officer on March 8, 2006, that he had served in the El Salvadoran military as a soldier from 1983 to 1986. The applicant testified that he served in combat and that he never interrogated anyone or used force against a civilian.

At the time of his removal proceedings on July 16, 2007, the applicant testified that he served eight years in the El Salvadoran military. When asked did he ever kill anyone, the applicant replied, "[t]hat I've seen personally, no. But in combat, you, know, these are things that you shooted, thing like that." The applicant testified that his unit would capture the guerillas that were fighting and take them to the high commanders. The applicant testified that he did not know what happened to the guerillas, he never interrogated anyone and he never violated anyone's human rights.

In issuing his order, the immigration judge (IJ) denied the applicant's application for asylum and withholding of removal and his request for withholding of removal under the convention against torture. The Board of Immigration Appeals affirmed the decision of the IJ on September 30, 2008.

In response to a Notice of Intent to Deny dated January 21, 2010, which requested the applicant to submit answers to the questions outlined in the notice regarding his military service, the applicant, in response, submitted a statement. The applicant indicated that he was a soldier in the army from January or February 1983 to the end of 1988, he was trained in [redacted] and for two additional months in [redacted] he was trained to use the M-16, M-60, M-79 M-90 and grenades, he served with [redacted] and his commanding officers were Captain [redacted] Lieutenant [redacted] and Colonel [redacted] The applicant indicated his duties as "patrol near the base with my squadron. When I was not patrolling I did guard duty. Other times I did my personal duties, like washing clothes and preparing food." The applicant indicated that he was in firefights throughout his military service, but he did not participate in any interrogations.

In issuing his decision on October 20, 2010, the director noted that according to the Resource Information Center (RIC), country conditions indicate that during the timeframe that the applicant served, the [redacted] perpetrated numerous human rights violations. The applicant denied participating in human rights abuses during his military service. However, the director determined that the persecutor bar applies even if the applicant did not personally commit the persecutory act, so long as the applicant 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 director concluded, in pertinent part:

> Your testimony was found not credible with respect to inconsistent and vague testimony denying knowledge of human rights abuses. In light of the country conditions information provided by the RIC, it appears highly unlikely that you were not aware of and did not participate in persecutorial acts from 1983 to 1988. You were a member of a specific unit that is documented to have abused human rights. As such, you having the burden of proving by a preponderance of the evidence that the ground does not apply. During your Asylum claims, you failed to establish that you did not take part in any violation and therefore, you are barred as a persecutor.

A review of the oral decision of the IJ does not support the director's findings. In his oral decision, the immigration judge (IJ) found that the applicant's burden of proof had not been met as there were inconsistencies in his testimony regarding the date of his father's death, his past persecution, the omission of his daughter's rape on his asylum application, and his reasons for returning to El Salvador and coming to the United States. The inconsistency regarding the applicant's military service was solely based on the length of time he actually served. The IJ noted, in pertinent part

> He had stated in his testimony that there was a one-year mandatory service that was pre-civil conflict. During the civil conflict or war it turned into a two-year mandatory service. But here the respondent testified that he has served eight years and primarily that as a soldier. The respondent gave no indication that he served as an officer or as a leader or any way in a command position. It is the opinion of the Court that the respondent has not shown that the guerillas or rebels would have had a particular interest in the respondent with regard to his military service or his association with his father.

The IJ found that there was no evidence that the applicant wanted to harm the guerillas or that the guerillas wanted to harm him.

In *Matter of Rodriguez-Mejano*, 19 I&N Dec. 811, 814-15 (BIA 1988), it was 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. Therefore, the applicant's membership in an El Salvadoran military unit is insufficient, by itself, to invoke the persecutor bar

In *Miranda-Alvarado v. Gonzalez*, 449 F.3d 915, 927 (9th Cir. 2006), the court held that "determining whether a petitioner 'assisted in persecution' requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability . . . . [m]ere acquiescence or membership in an organization is insufficient to satisfy the persecutor exception."

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 in the record that the applicant "ordered" or "incited" 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 ordered or "assisted or otherwise participated" in any persecutory activities. To reach such a conclusion would be through a guilty by association link to the [redacted] 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.

The case will be remanded to the director for further adjudication of the TPS application. A review of the record reflects that the validity period of the applicant's fingerprint check has expired. Therefore, the case will be remanded for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. 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.

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