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U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **APR 04 2013**

Office: CALIFORNIA 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. § 1254a

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 California 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center. The application is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Haiti 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 was ineligible for TPS under section 208(b)(2)(A)(i) of the Act for having ordered, incited, assisted or otherwise participated in the persecution of others.

On appeal, counsel asserts that the director erred in deeming the applicant a persecutor for having ordered, incited, assisted or otherwise participated in the persecution of others, and, therefore, denying TPS.

The AAO has reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

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.

The term *continuously physically present*, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

The term *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual and innocent

¹The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

On January 21, 2010, the Secretary designated Haiti as a country eligible for TPS. This designation allowed nationals of Haiti who have continuously resided in the United States since January 12, 2010, and who have been continuously physically present in the United States since January 21, 2010, to apply for TPS. On May 19, 2011, the Secretary announced an extension of the TPS initial designation for Haiti until January 22, 2013. On May 19, 2011, the Secretary also re-designated Haiti for TPS eligibility which became effective on July 23, 2011, and remains in effect until January 22, 2013, upon the applicant's re-registration during the requisite time period. This re-designation allowed nationals of Haiti who have continuously resided in the United States since January 12, 2011, and who have been continuously physically present in the United States since July 23, 2011, to apply for TPS. The initial registration period for the new re-designation began on May 19, 2011, and ended on November 15, 2011.

The applicant filed his TPS application on February 22, 2010. The record includes evidence of the applicant's nationality, in the form of his Haitian birth certificate; and, the applicant's continuous residence in the United States since prior to January 12, 2010, and his continuous physical presence since January 21, 2010.

Therefore, the applicant is a national of a state designated under section 244(b) of the Act, he meets the criteria for continuous residence in the United States since January 12, 2011 and continuous physical presence in the United States since July 21, 2010 as described in 8 C.F.R. § 244.2(b) and (c). However, as discussed below the record reflects that the applicant is ineligible for TPS.

The first issue in this proceeding is whether the applicant is an alien who is described in section 208(b)(2)(A) of the Act, and therefore, is ineligible for TPS.

Section 244(c)(2)(B)(ii) of the Act states, in pertinent part, that ...an alien shall not be eligible for temporary protected status under this section if the Attorney General finds that the alien is described in section 208(b)(2)(A).

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.

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.

In *Miranda-Alvarado v. Gonzalez*, 449 F.3d 915, 927 (9th Cir. 2006), it was 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."

In her denial the director deemed the applicant ineligible for TPS under section 208(b)(2)(A)(i) of the Act for having ordered, incited, assisted or otherwise participated in the persecution of others. The director based her determination on the record which establishes that the applicant had been a member of the Haitian National Police who had been employed at the National Penitentiary from 1998 to 2006, a period when there was widespread abuse and torture of political prisoners at that prison facility from the "Lavalas" party. The director noted that the applicant served as a prison guard at the National Penitentiary and had been in direct contact and maintenance of prisoners during a period of bloody and brutal repression of the populace and specifically Aristide supporters at the National Penitentiary. The director also noted that the applicant's activities during this period form the basis for the Asylum Officer's determination that the applicant was a persecutor of others.

On appeal, counsel contends that contrary to the decision of the director, the applicant was mainly stationed at the front gate of the National Penitentiary checking visitors, officers and officials; would assist in monitoring inmates, moving them from place to place, and other common prison guard duties; and that the applicant abandoned his employment with no notice due to the persecution and torment he witnessed occurring in the prison. Counsel asserts that the director erred in deeming the applicant a persecutor or that by his activities he had ordered, incited, assisted or otherwise participated in the persecution of others. Counsel submits additional evidence.

Counsel also implies that the applicant was assisted by an individual who incorrectly prepared his TPS application to his detriment. Counsel also contends that the applicant relied on a preparer to complete his TPS application, and that the preparer failed to explain why the applicant indicated "yes" to the questions pertaining to the possession and use of weapons, specifically that the applicant's prison guard duties required him to carry and use a weapon. However, there is no remedy available for an applicant who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on his behalf. See 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. Cf. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal

based on ineffective assistance of counsel). Furthermore, USCIS is not responsible for action, or inaction, of the applicant's representative.

Contrary to counsel's assertions, the applicant has provided questionable testimony and documentation. The applicant claims that he abandoned his employment with no notice due to the persecution and torment he witnessed occurring in the prison. In support, the applicant submits an October 3, 2011 letter from [REDACTED] Head of Personnel, of the National Police of Haiti, Department of Penitentiary Administration, stating that in July 1995, the applicant commenced employment with its police department; and, that "On July 14, 2005, it was decided to put an end to his functions as a Penitentiary agent due to Abandonment of Post." However, in his June 20, 2006 sworn statement before an immigration officer during his Credible Fear interview, the applicant testified that since March 2005 he started having problems at his job; that "some people who were in jail had their gang members outside persecuting [him]. In November of 2005, one of the detainees held [him] and the others came and tried to hit [him]. [He] ran to tell his group members and [they] returned as a group and [they] put [the detainees] in solitary." The applicant further attested that he later discovered that the detainees wanted to kill him because they did not like him. When asked why he was not liked by the detainees, the applicant stated that "If you bring people to order they are against you. If you give them pressure and place them in solitary so they can get back to order, they hate you." The applicant further stated that he never witnessed prisoner abuse while working at the prison.

The applicant's sworn statements contradict his claim that he abandoned his employment with no notice due to the persecution and torment he witnessed occurring in the prison. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA).

Also, by his sworn testimony, contrary to his claim that he primarily performed guard duties and was never involved or witnessed mistreatment of prisoners, the applicant's statements confirms his involvement in disciplining detainees whom he claims did not like him because he disciplined them, so much so, that detainees whom he had disciplined sought to kill him. Yet, the applicant also claims that he never mistreated any of the detainees and that he never witnessed mistreatment of detainees at the National Penitentiary, a prison known for serious human rights atrocities of inmates who were primarily political prisoners during a period of political turmoil and repression of opponents in Haiti. See, National Coalition for Human Rights (NCHR) Report on a tragic event in the National Penitentiary on December 1, 2004.

The AAO finds the record to establish the applicant to be an alien who ordered, incited, assisted or otherwise participated in the persecution of any person on account of political opinion. As the applicant is an alien who is described in section 208(b)(2)(A) of the Act, he is ineligible for TPS.

Beyond the decision of the director, the applicant is also inadmissible under section 212(a)(6)(c)(i) of the Act for willfully misrepresenting a material fact to procure a benefit under the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

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- (i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
- (ii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

A misrepresentation is generally material only if by it the alien received a benefit for which he/she would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72.

The record reflects that on June 11, 2006, the applicant sought to procure entry into the United States by presenting an altered Haitian passport that contained a counterfeit ADIT stamp. The record of proceedings is clear that the applicant willfully misrepresented a material fact pursuant to Section 212(a)(6)(C)(i) of the Act, in an attempt to procure entry into the United States.

Therefore, the applicant cannot be granted TPS as he is inadmissible under section 212(a)(6)(c)(i) of the Act for willfully misrepresenting a material fact to procure a benefit under the Act.

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

As discussed, pursuant to section 208(b)(2)(A) of the Act, the applicant is ineligible for TPS. Hence, in this proceeding no purpose would be served in providing the applicant the opportunity to submit an Application for Waiver of Grounds of Inadmissibility, (Form I-601).

An alien applying for TPS 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. As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

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ORDER: The appeal is dismissed.