



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 30 2013

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. § 1254a

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 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 M. Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was denied by the Director, Vermont Service Center. A subsequent appeal to the Administrative Appeals Office (AAO) was summarily dismissed because the applicant failed to address any of the issues raised by the director in his decision or submit any evidence in support of the appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The AAO will affirm the decision of the director to deny and the application will remain denied.

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 applicant's TPS application because it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others.

The AAO dismissed the appeal on October 27, 2011 because the applicant failed to identify specifically any erroneous conclusions of law or statement of facts for the appeal. Nor did the applicant address or submit any evidence, on appeal, to establish eligibility for TPS and to overcome the director's findings. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision

On motion, counsel for the applicant submits a brief and the applicant submits a Declaration stating that he "never knowingly and willfully" participated in any persecutory acts and denies any membership in a "death squad." Counsel asserts on motion that the applicant did not purposefully assist the Civil Defense Unit he was obligated to participate in with persecution. Counsel also asserts that the applicant was obligated to participate in the Civil Defense Patrol unit in his area under threat of being forced from his home, that he was unaware of persecutory acts by fellow members of the CDU, and that he left the CDU once he witnessed persecution and that he immediately abandoned the CDU and his home.

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 Attorney General 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; and

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 and/or Section 212(a)(3)(E)(iii)(5)(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.

Section 212(a)(3)(E)(iii)(5)(a) of the Act states in pertinent part:

(iii)COMMISSION OF ACTS OF TORTURE OR EXTRAJUDICIAL KILLINGS-Any alien who, outside of the United States, has committed, ordered, incited, assisted or otherwise participated in the commission of-

- (I) any act of torture, as defined in section 2340 of title 18, United States Code; or
- (II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Prosecution Act of 1991 (28 U.S.C. 1350 note), is inadmissible

On his Form I-589, Request for Asylum in the United States and the supplemental statement he submitted with the application, the applicant indicated “When I was in El Salvador I was obligated to be part of the death squadron by the Salvadorian army.” He indicated that he was a member of the group for a year and half. The applicant stated that his group went out on patrols looking for guerrillas. The applicant also stated “Every time we went patrolling I used to carry a flash light to light the guerrilla fighters that we were killing.” At his asylum interview, the applicant testified under oath before an asylum officer that he was a member of the death squad

in [REDACTED] El Salvador for one and one-half years. He stated that he was present by the side of the road when other death squad members would enter suspected guerilla homes with guns and machetes. The applicant stated that he heard screams but did not enter the homes. During patrols, he held a flashlight to light their path while other members carried guns and machetes. The applicant recounted one incident when his group encountered a guerilla and he held the flashlight while other members of his group killed the guerilla. He became scared and fled the scene. The applicant stated that he did not personally kill any one and that his job was to shine the flashlight on a suspected guerilla so that other members of the death squad could kill him.

On motion, the applicant stated that he was one of about 10-15 men from his Canton who were obligated by the Salvadoran army to join the Civil Defense Patrol (CDP). He indicated that the purpose of the CDP was to patrol the town and surrounding area and to be on the lookout for evidence of guerilla activity. The applicant stated that on one occasion, a combined CDP group of about 50 men went out on patrol. While he stayed on the road with a lantern, other men entered homes, took people out of their homes, killed them with machetes, and left their bodies on the side of the road. After this incident, he left his home because he did not want to participate in the "illegal and immoral" activity and could not refuse to participate in the CDP.

On motion, counsel asserts that the applicant did not purposely assist the CDP unit he was obligated to participate in with persecution. He claims that when the applicant joined the CDP, he did not know the organization would engage in persecution, that the applicant did not personally engage in persecution, that the applicant witnessed persecutory acts by other members of the CDP and immediately abandoned the organization and his home.

Amnesty International (AI) indicates that during the civil war, El Salvador relied on other security forces including CDP to protect national security. In a September 1982 report, "Assigning Responsibility for Human Rights Abuses: El Salvador's Military and Security Unit," AI reports of various human rights violations by members of the CDP. The report indicates that in March 1982, twelve members of the CDP were arrested for a group murder of nineteen people including five children under age two. The report also indicates that in late May 1982, six members of one CDP were arrested in connection with the murders of two Christian Democrats, including two newly-elected mayors, in addition to the killings of nine party leaders by members of CDP in the same month. Civil Defense squads were also named as responsible for the slaying of six other party activities and 22 peasant party supporters in the same month. The applicant testified at his asylum interview and on motion that members of his CDP squad engaged in indiscriminate killing of individuals perceived to be members of the guerilla forces. Thus the applicant belonged to an organization that has been implicated in numerous human rights violations during the period 1982-1983, when the applicant served with that unit.

The Director, Vermont Service Center, in issuing his decision to deny the applicant's TPS, determined that in light of the applicant's testimony at his asylum and TPS interviews, the applicant is an alien described in Section 208(b)(2)(A)(i) of the Act, as an alien who ordered, incited, assisted or otherwise participated in the persecution of others on account of race,

religion, nationality, membership in a particular social group or political opinion. The director noted that the burden of proof is now upon the applicant to establish by a preponderance of the evidence that the persecutory bar did not apply to him. Accordingly, the director found the applicant ineligible for TPS and denied his application.

In order to determine whether an applicant “assisted or otherwise participated in” persecution, the adjudicator should ask: “did the [applicant’s] acts further the persecution, or were they tangential to it?” *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 928 (9th Cir. 2006). The U.S. Supreme Court in the case of *Federenko v. United States*, 449 U.S. 490 (1981) has provided guidance in interpreting the persecutor bar. In *Federenko*, the alien was forced to work in a concentration camp as a guard during World War II after his capture by the Germans. *See Id.*, at 494. In that case, even though the alien did not directly participate in the persecution of others, the Court held that the respondent was nevertheless inadmissible under the Displaced Persons Act because the persecutor bar under that statute applies. *See Id.*, at 513. Following the *Federenko* decision, many lower courts have expanded the persecutor bar so that personal involvement in killing or torture is not necessary for a finding that an alien assisted in persecution. For example, the second circuit court of appeals held that “[P]ersonal involvement in killing or torture is not necessary to impose responsibility for assisting or participating in persecution. *Ofusu v. McElroy*, 98 F.3d, 694, 701 (2nd Cir. 1996) (emphasis added). The seventh circuit found that the atrocities committed by a unit may be attributed to the individual based on his membership and apparent participation. *Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993), cert. denied, 510 U.S. 1196 (1994). Similarly, the Board of Immigration Appeals (BIA) instructs the court not to look at the subjective intent of the alien, but at the “objective effects of the alien’s actions.” *Matter of Rodriguez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988). It is notable that there is no mens rea requirement for the persecutor bar to apply and that the alien’s actions need not be of his own volition. *See Id.* (citing *Federenko*, supra).

In this case, the applicant testified under oath that he was a member of the CDP for almost one year and a half during the period 1982 -1983 and that he and members of his unit went out on patrol of the neighborhoods “looking for evidence of guerilla activities.” The applicant testified that he carried a lantern while other members of his group carried guns and machetes. He testified that on several occasions he was present when members of his group entered homes and dragged suspected guerillas out and killed them. He testified that he would hear screaming from the homes but he did nothing to stop the killing because he stayed outside and did not enter the homes.” The applicant recounted one particular heinous incident when a group of about 50 CDP members entered homes in an area, dragged people out of their homes, killed them with machetes and left their bodies on the side of the road. The applicant claimed that after this particular incident, he left the organization and fled his home because he did not want to participate in the persecution.

By his own admission, the applicant was present when persecutory acts were committed by members of his group and he did nothing. He actively assisted his group’s heinous acts of indiscriminate killings of individuals by holding the lantern so that CDP members could kill people or by shining the flash light on suspected guerillas so that CDP could kill them. The applicant claimed that he never killed anybody. However, he went out on patrol with his group, he provided support by holding a lantern for the other members of the group so that they could

see and kill people. The applicant was well aware that members of his group killed people for no justifiable reason and he stated that he heard people screaming as they were being killed by members of his group. Therefore, the applicant's actions were to such a degree that it is deemed that he assisted or participated in the persecution of others. *Matter of Rodriguez-Majano*, 19 I&N Dec. 814-815 (BIA 1988). As indicated above, there is no duress defense to the persecutor bar, because the intent of the person who assisted in persecution is not relevant under the law. *See Federenko, id.*

Once a persecutor bar has been established, the applicant has the burden of proving by a preponderance of the evidence that the persecutor bar does not apply to him. The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his own statements. In this case, the applicant has failed to provide any evidence to refute the director's finding and to establish that he did not persecute or assist in the persecution of others. Therefore, the director's decision to deny the application based on Section 208(b)(2)(A)(i) of the Act is affirmed.

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. The applicant has failed to meet this burden.

ORDER: The appeal is dismissed