

(b)(6)



U.S. Citizenship  
and Immigration  
Services

[Redacted]

DATE: **AUG 28 2013**

Office: VERMONT SERVICE CENTER [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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. 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,

A handwritten signature in black ink, appearing to read "Ron M. Rosenberg".

Ron M. Rosenberg  
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 consideration.

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 after determining that the applicant is ineligible for TPS because the applicant is an individual 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 appeal, counsel for the applicant asserts that Section 208(b)(2)(A)(1)(B) of the Act does not apply to the applicant because “the record does not support a finding that the applicant in any way participated in the persecution of others notwithstanding his having served in an infantry battalion during the civil war 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 as designated by the Attorney General, now the Secretary, Department of Homeland Security (Secretary), is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 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 stated on his Form I-589, Request for Asylum in the United States, which he filed on February 24, 1994, that he was a member of the Salvadoran army and his job was to “secure the Salvadoran towns.” In a statement dated April 25, 2012, the applicant stated that he was a member of the armed forces of El Salvador and served in the infantry in the [REDACTED] battalion under different commanding officers, one of who was [REDACTED]. He was trained in the use of M-16, AK-47, M-60, handguns, knives and mutual physical combat in case he had to defend himself without a weapon. He served as an infantryman from 1983 until 1991 when he left the military. The applicant also stated that he was involved in combat and had only used his weapons during training or in combat. The applicant denied any direct involvement in interrogations but indicated that he had provided security on at least one occasion at a facility where interrogations were being handled. The applicant further stated that his last commander, [REDACTED] was investigated for war crimes, but that he was not part of his unit where the alleged war crimes were committed.

Based on the applicant’s testimony about his service in the El Salvador military, on October 4, 2012, the director found the applicant ineligible for TPS under section 244(2)(B) of the Act and denied the application because he determined that the applicant was an alien described in section 208(b)(2)(A)(i) of the Act.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). A review of the entire record does not establish that the applicant participated in the persecution of others on account of a protected characteristic, and therefore should not be barred from receiving TPS in the United States pursuant to section 208(b)(2)(A)(i) of the Act.

The persecutor bar applies to individuals who “ordered, incited, assisted, or otherwise participated in the persecution of others.” *See* INA § 208(b)(2)(A)(i); 8 C.F.R. § 208.13(c). Therefore, for the persecutor bar to apply, the record has to establish that the applicant “ordered, incited, assisted, or otherwise participated in the persecution of others.” In *Matter of A-H-*, 231 I&N Dec. 774 (A.G. 2005), the Attorney General provided interpretive tools for construing the series of verbs in the persecutor bar and summarized principles identified in existing precedent:

To ‘incite’ means ‘to move to a course of action: stir up: spur on: urge on’ or ‘to bring into being: induce to exist or occur.’ *Webster’s Third New International Dictionary of the English Language Unabridged* 1142 (2002). To ‘assist’ means ‘to give support or aid: help.’ *Id.* At 132. And to ‘participate’ means ‘to take part in something (as an enterprise or activity) usu. in common with others.’ *Id.* At 1646. Case law teaches that (1) these terms are to be given broad application, *see, e.g. Kulle v. INS*, 825 F.2<sup>nd</sup> 1188, 1193 (7<sup>th</sup> Cir. 1987); (2) they do not require direct personal involvement in the acts of persecution, *See, e.g. Ofosu v. McElroy*, 98 F.3d 694, 701 (2<sup>nd</sup> Cir. 1996); (3) it is highly relevant whether the alien served in a leadership role in the particular organization, *See, e.g. Kalejs v. INS*, 10 F.3d 441, 444 (7<sup>th</sup> Cir. 1993); and (4) in certain circumstances statements of encouragement alone can suffice, *See, e.g. United States v. Koreh*, 59 F.3d 431, 440 (3d Cir. 1995). It is appropriate to look at the

totality of the relevant conduct in determining whether the bar to eligibility applies. See e.g. *Hernandez v. Reno*, 258 F.3d 806, 814 (8<sup>th</sup> Cir. 2001).

231 I&N Dec. 774, 784-85(A.G. 2005) (footnotes omitted).

Therefore, to determine whether an applicant “assisted or otherwise participated in” persecution, the adjudicator has to make an affirmative determination of whether “the [applicant’s] acts further the persecution, or were they tangential to it” *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 928 (9<sup>th</sup> Cir. 2006). The U.S. Supreme Court case of *Federenko v. United States*, 449 U.S. 490 (1981) provided guidance in interpreting the persecutor bar cases. Following the *Federenko* decision, lower courts have expanded the persecutor bar so that personal involvement in killing or torture is no longer 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 (2<sup>nd</sup> 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 (7<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1196 (1994). But the Board of Immigration Appeals (BIA) held that mere membership in a persecutory organization does not qualify a person as a persecutor unless the person’s action or inaction furthered the persecution in some way. The BIA instructed the court not to look at the subjective intent of the alien, but at the “objective effects of the alien’s actions.” *Matter of Rodriquez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988). Therefore, it is the objective effect of an alien’s action that is controlling. *Matter of Rodriquez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988).

The BIA also held in *Matter of Rodriquez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988), that some acts directly related to civil war are not persecution. For example,

harm which may result incidentally from behavior directed at another goal, the overthrow of a government or, alternatively, the defense of that government against an opponent, is not persecution. In analyzing a claim of persecution in the context of a civil war, one must examine the motivation of the group threatening harm.

*Id* at 815.

The BIA also indicated that some acts, if completed on account of one of the five grounds, could be persecution, even in wartime. *Id* at 816.

In this case, the record reflects that the applicant was a member of the Salvadoran military from 1983 to 1991, that he served as an infantryman in [REDACTED] battalion during the duration of his military service, that he held no supervisory or leadership position, and that he participated in combat against the guerilla group in El Salvador that was engaged in warfare against the government of El Salvador. The applicant stated that he was not present during the interrogation of prisoners or witnessed any interrogation going on, though he served as a guard on at least one occasion at a location where interrogations were being held. There is no evidence in the record that

the applicant provided security at the time of interrogation or that interrogation occurred while the applicant was on guard duty. The applicant indicated that his last commanding officer was [REDACTED] who was investigated for war crimes, but that he was not part of the commanding officer's unit at the time the crimes were committed.

Based on our *de novo* review of the record, the AAO does not find that the applicant "ordered, incited, assisted or otherwise participated in the persecution" of others on account of a protected characteristic.<sup>1</sup> The record does not contain sufficient probative evidence to establish that the applicant participated or assisted in any persecutory activity during his military service. The record does not contain evidence to establish that the applicant's actions in fighting the guerrillas during the civil war were on account of the guerrillas' political opinion. Rather, the evidence shows that the actions of the applicant were in the context of a civil war between the government of El Salvador and the guerrillas, who were fighting for the overthrow of the Salvadoran government and the applicant was defending his country.

As indicated above, section 208(b)(2)(A)(I) of the Act specifies that for the persecution bar to apply, an alien must have "ordered, incited, assisted or otherwise participated in the persecution of any person ...." A review of the entire record however, does not establish that the applicant directly or indirectly "assisted or otherwise participated" in the persecution of others. To reach such a conclusion would be through a "guilty by association link" to the Salvadoran military, 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 shows that the applicant has a criminal record in the United States. The director should review the applicant's criminal record and the results of the latest fingerprint report and determine whether the applicant should be barred from receiving TPS benefits in the United States. 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.

---

<sup>1</sup> 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).