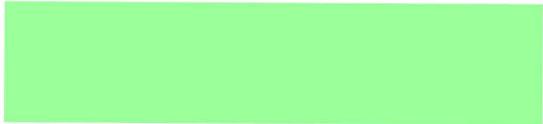




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 17 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.

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 withdrew the applicant's TPS after he determined that (1) 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 and (2) the applicant failed to provide information (court dispositions) necessary for the adjudication of his application. 8 C.F.R. § 244.9(a).

On appeal, counsel asserts that the applicant was conscripted to serve as a soldier in the Salvadoran military, that the applicant did not participate in any persecutory acts or torture of any one. Counsel states that the applicant only engaged in routine military service, that he did not participate in the interrogation or the persecution of others and therefore should not be barred as a persecutor. Counsel also asserts that the applicant has not been convicted of two or more misdemeanors and that he has submitted all necessary court documentations required for the adjudication of his application.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(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 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 first issue in this proceeding is whether the record supports the director's decision that the applicant ordered, incited, assisted or otherwise participated in the persecution of others.

In support of his re-registration application, the applicant submitted a declaration. In that declaration, the applicant stated the following:

He was a member of the Salvadoran Army from 1990 to 1992. He served in the [REDACTED]. The commander of the entire unit was [REDACTED] but he does not remember the name of his immediate commander. He received military and weapons training as part of his membership in the Salvadoran army. He received training in the use of M-16 rifle, M-60 machine gun, and M-79 and M-90 grenade launchers. He participated in many combats against the guerillas in the mountains. During combat, his unit captured guerillas and took them back to the base but he did not personally capture any guerilla. He was an infantry soldier and did not participate in the interrogation of prisoners. The applicant denies committing any human rights abuses.

On February 22, 2011, the director issued a Notice of Intent to Deny (NOID), which informed the applicant that he had indicated 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) 2t, “[h]ave you ever received any type of military, paramilitary, or weapons training?” The applicant was advised to submit a detailed explanation and describe the circumstances when responding to the questions above. The applicant timely responded reiterating the same information contained in his declaration.

On November 10, 2011, the director withdrew the TPS application. In denying the application, the director noted that between 1983 to August 1990, [REDACTED] unit was implicated in human rights abuses of prisoners and that [REDACTED] database * linked [REDACTED] to human rights violations committed during the war. The director noted that the evidence suggests that the applicant would have at least been aware of the human rights abuses committed by elements in his unit.

* [REDACTED]

On appeal, counsel submitted a brief asserting that the director's denial of the applicant's TPS was in error and that the record contains "not one identifiable act of persecution that [the applicant] allegedly assisted in." Counsel states that the applicant was part of the Salvadoran armed forces that served a legitimate purpose outside of perpetration of persecution. Counsel noted that since March 9, 2001, the applicant has been in TPS status and has been approved for renewal each time he applied and that United States Citizenship and Immigration Services (USCIS) has never challenged the credibility of the applicant's version of events. Citing several case laws and the Executive Office of Immigration Review's (EOIR) bench book, counsel contends that the director's reliance on [REDACTED] database is flawed and potentially inaccurate

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.

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, it need not be established that the applicant actually committed acts of persecution; rather, the bar will apply if the applicant "ordered, incited, assisted, or otherwise participated in the persecution of others." In *Matter of A-H-*, 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.2nd 1188, 1193 (7th 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 (2nd 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 (7th 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 (8th Cir. 2001).

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

Thus, 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 BIA has 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. Therefore, it is the objective effect of an alien’s action which is controlling. *Matter of Rodriguez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988).

In this case, the applicant stated that he was a member of the Salvadoran military from 1990 through 1992. He received training in the use of rifle and grenade launchers and participated in combat against the guerillas – legitimate actions of a soldier during armed conflict. The applicant indicated that he served as an infantry soldier with no leadership position and no decision-making authority. He denied any involvement in the interrogation of prisoners, denied participation in any human rights abuse and indicated that he was not aware of any human rights abuse by members of his unit. The record does not contain any evidence demonstrating that the applicant engaged in acts that are persecutory in nature, or that he assisted or otherwise participated in the persecution of others. The record supports the applicant’s statement that he performed his duties as a soldier during an armed conflict between the government of El Salvador and the guerillas.

In *Matter of Rodriguez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988), the BIA held 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. However, if an applicant’s action or inaction furthers persecution in some way, he or she is ineligible for relief.

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, while the applicant indicated that he served in the El Salvador military from 1990 to 1992, there is no evidence in the record demonstrating that the applicant’s actions in fighting the guerrillas during the civil war furthers persecution in some way. There is no indication that the applicant’s actions in fighting the guerillas during the civil war in that country was on account of the guerrillas’ political opinion. Rather, the evidence suggests that the actions of the applicant were in context of a civil war between the Salvadoran military 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” While the [REDACTED] Database has been cited as evidence that persecutory acts were committed by [REDACTED] and [REDACTED] it did not specifically link the applicant to these acts. 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 otherwise 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 Salvadoran army, 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. Mere acquiescence or membership in an organization, even one which engages in persecution, is insufficient to satisfy the persecutor exception. *Miranda-Alvarado v. Gonzalez, id.* 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 second issue in this proceeding is whether the record supports the director’s decision that the applicant is barred from receiving TPS based on his criminal record in the United States.

An alien shall not be eligible for TPS under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

8 C.F.R. § 244.1 defines “felony” and “misdemeanor:”

Felony means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

Misdemeanor means a crime committed in the United States, either

- (1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
- (2) A crime treated as a misdemeanor under the term "felony" of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

The Federal Bureau of Investigation report reflects the applicant's criminal record in the state of California as follows:

1. On [REDACTED] 2005, the applicant was arrested by the [REDACTED] Police Department and charged with violating section 23152(a) CVC, driving under the influence, and section 23152(b) CVC, driving with .08 percent or more alcohol in the blood. Agency case [REDACTED]
2. On [REDACTED] 2006, the applicant was arrested by the [REDACTED] for violating two counts of section 23152(a) CVC and one count of section 23152(b) CVC. Agency case [REDACTED].

In response to the notices dated January 14, 2008, and April 29, 2011, which requested the applicant to submit certified judgment and conviction documents from the courts for all arrests, the applicant provided:

- Certified court documentation in Case no. [REDACTED] from the [REDACTED] Superior Court indicating that the applicant was charged with violating section 23152(a) CVC with prior and section 23152(b) CVC with prior. On [REDACTED], 2006, the applicant pled no contest to and was found guilty of violating each offense. The court document indicates that the applicant admitted to priors.
- Certified court documents dated [REDACTED] 2008 in agency case [REDACTED] from the [REDACTED] Superior Court - Richmond, indicating that no complaint/citation had been filed for the violation of section 23152(a) CVC.
- A certified letter dated [REDACTED] 2011, from the deputy clerk of the Superior Court of [REDACTED] indicating that a search of the court's criminal index found no active warrants or active cases filed regarding the applicant's arrest on [REDACTED] 2006.
- A certified court document dated [REDACTED], 2011 from the [REDACTED] Superior Court indicating that no complaint/citation had been filed for a 2003 case.

The applicant has the burden to establish, with affirmative evidence that outstanding charges were dismissed or were in error. In the instant case, the applicant has failed to do so. First, the court documentation in Case no. [REDACTED] is not complete as the sentence handed down for violating sections 23152(a) and (b) CVC was not provided. Second, the applicant did not provide the court disposition for his “priors.” Third, because the court documents in agency case [REDACTED] did not indicate the date of arrest, it is not known which arrest ([REDACTED] 2005 or [REDACTED], 2006) they relate to.

Therefore, based on the record before it, the AAO finds that the applicant is ineligible for TPS because of his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a).

An alien applying for temporary protected status 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. Consequently, the director’s decision will be withdrawn in part as it pertains to the persecutory bar and affirmed in part as it pertains to criminal grounds.

ORDER: The appeal is dismissed.