



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **MAR 19 2013**

Office: VERMONT SERVICE CENTER

FILE: [Redacted]

IN RE: Applicant: [Redacted]

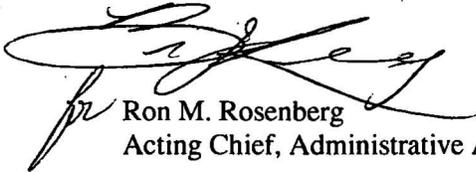
APPLICATION: Application for Temporary Protected Status under Section 244 of the
Immigration and Nationality Act, 8 U.S.C. § 1254a

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 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,



Ron M. Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

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 the director erred in finding the applicant is barred from the grant of TPS pursuant to § 208(b)(2)(A)(1)(B) for being a persecutor. 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. Citing the BIA's decision in *Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005), in which the BIA stated that the government must offer prima facie evidence to indicate that an alien incited, assisted, or otherwise participated in the persecution of persons on account of a protected ground before the burden shifts to the alien, counsel indicated that in the present case, the director did not produce any evidence implicating the applicant, nor did he cite any evidence or authority to establish that the applicant participated in persecutory acts. Counsel indicated that the only evidence relied on by the director is the applicant's military service.

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 a Form I-589, Request for Asylum in the United States, which he filed on October 3, 1990, that he served in the Salvadoran army from January 1, 1984 through January 1, 1986, and in the air force from October 1, 1986 to November 1, 1988. He indicated on the form that he was in combat during the period of his military service but that he did not participate in any persecutory acts.

In response to a Notice of Intent to Deny dated January 19, 2010, which requested the applicant to submit answers to the questions outlined in the notice regarding his military service, the applicant submitted a statement. In that statement, the applicant stated “I was a member of the Salvadoran military, army, from January 1, 1984 until November 28, 1988. The first squadron that I was a member of was called [REDACTED] (from 01/01/1984 until 12/31/1985); the second squadron I was a member of was called [REDACTED] (from 01/1986 until 12/28/1988). The applicant stated that in both cases he served as a soldier. The commanding officer of his first squadron was [REDACTED] and the commanding officer of his second squadron was [REDACTED]. The applicant indicated his duties were to guard the cities, towers, and electric plants from guerillas and that he assisted in operations where “we search for guerillas.” The applicant also stated that he received training from the governments of El Salvador and the United States, that he participated in combat on at least 30 occasions, all were confrontations between the guerillas and the army lasting no more than one day for each combat. The applicant further stated that he never participated in any interrogations.

Based solely on the applicant’s statement about his service in the El Salvador military, on February 8, 2012, the director found the applicant ineligible for TPS under section 244(2)(B) of the Act and denied the application because “you are an alien described in section 208(b)(2)(A)(i) of the Act.” In issuing the decision, the director concluded that “the evidence indicates that there is a high likelihood that you were involved in persecutory violations during your two enlistments in the military since the time periods were during which many of them took place and you are barred as a persecutor.”

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 Rodriquez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988).

In this case, the applicant admitted that he was a member of the Salvadoran military from January 1, 1984 through November 1, 1988. He indicated that he participated in combat during that period in which “there were confrontations between the guerrillas and the army.” *See Statement from [REDACTED]* dated February 1, 2010. However, there is no evidence in the record that the applicant persecuted other people on account of a protected ground or that he was known to persecute individuals. There is no evidence in the record to demonstrate that the applicant engaged in acts that are persecutory in nature, or that he assisted or otherwise participated in the persecution of others. The applicant in essence testified that he performed his duties as a soldier during an armed conflict between the government of El Salvador and the guerillas.

In *Matter of Rodriquez-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 for about four years, from January 1, 1984 to November 1, 1988, there is no evidence in the record demonstrating that the applicant's actions in guard duties and 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 guerrillas during the civil war in that country was on account of the guerrillas' political opinion. Rather, the evidence indicates 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" A review of the entire record however, does not establish that the applicant directly or indirectly "assisted or otherwise participated" in any persecutory activities. 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. It appears that the only evidence cited by the director in denying the applicant's TPS is his mere membership in the El Salvador military. 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.

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 met this burden.

ORDER: The appeal is sustained.