



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: Office: VERMONT SERVICE CENTER FILE: [Redacted]
MAR 20 2013

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.

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center and the Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is again before the AAO on motion to reconsider. The motion will be dismissed. The application remains withdrawn.

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 because it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others. The AAO affirmed the director's decision. In affirming the decision, the AAO noted that country condition information from [REDACTED] Database indicates that during the time the applicant served in the El Salvador military (1986-1989) that the Battalion the applicant admitted he served under [REDACTED], perpetrated numerous human rights violations and that the applicant's commanders, [REDACTED] [REDACTED] are known human rights violators. Based on the applicant's service under the said Battalion and his active military combat, the AAO concurred with the director that the applicant is barred from receiving TPS. The AAO also noted that both the Immigration Judge (IJ) and the Board of Immigration Review (BIA) found the applicant ineligible for immigration benefits in the United States because the applicant actively combated guerrilla members while he was an active member of a military group which was known to have committed serious human rights violations. The IJ determined that the applicant's service in the battalion "clearly contributed to the overall strength and dynamic of the [REDACTED] in the 1980s which would render his participation in the military service at the time to be an action equal to a persecutor for purposes of the eligibility requirement under section 240A(b)(1)(iii) of the Act."

Once the persecutor bar attaches, the applicant has the burden of proving by a preponderance of the evidence that the persecutor bar does not apply.

On motion, counsel asserts that the AAO erred in dismissing the applicant's appeal based on an allegation that the applicant is barred as a persecutor. Counsel claims that the applicant while serving in the Salvadoran military and engaging in combat for about three years, had no knowledge of or participated in any activities which can be construed as ordering, inciting, assisting or otherwise participate in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

In support of the motion, counsel cites a Sixth Circuit case, *Diaz-Zanatta v. Holder*, 558 F. 3d 450 (6th Cir. 2009). In this case, the court held that for the persecutor bar to apply, there has to be a nexus between the person's actions and the persecution of others and the person acted with scienter by having some level of prior or contemporaneous knowledge that the persecution was being conducted. Counsel likened the applicant's case to that of *Diaz-Zanatta* and claims that there is no nexus between the applicant's actions and the persecution of others, and that the applicant lacked the required scienter that persecution was being conducted.

Counsel's argument is not persuasive and does not satisfy the requirements of a motion to reconsider. A motion to reconsider must: (1) 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 United States Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The case cited by counsel in support of the motion does not demonstrate that the initial decision by the director and the subsequent dismissal of the appeal by the AAO were based on an incorrect application of law or USCIS policy and contrary to the evidence of record at the time of the initial decision.

It has been settled by the courts and the BIA that personal involvement is not necessary for the persecutor bar to apply. In *Ofusu v. McElroy*, 98 F.3d 694, 701 (2nd Cir. 1996), the court stated that "[P]ersonal involvement in the killing or torture is not necessary to impose responsibility for assisting or participating in persecution." (emphasis added). The Seventh Circuit court in *Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993), cert. denied, 510 U.S. 1196 (1994) held that the atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation. See also, *Naujalis v. INS*, 240 F.3d 642 (7th Cir. 2001). And in *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988), the Board instructs the court not to "look at the subjective intent of the alien but at the objective effect of the alien's actions." The Board indicated that the proper analysis is to focus on whether the acts the alien committed amounted to assistance in persecution. It is the objective effect of the alien's action that is controlling. See *id.*, at 814-15.

In this case, the applicant was found to have participated in the persecution of others based on his active involvement in a unit of the El Salvadoran military that was known to have committed numerous human rights abuses during the period of time the applicant served in that unit. By his own admission, the applicant served in the [REDACTED] under the leadership of a notorious commander who has been cited as a known human rights violator. The applicant went out on patrol with this commander and this commander was specifically mentioned in country condition reports as a known persecutor. The evidence in the record shows that the El Salvadoran military's indiscriminate attacks involved innocent civilians in several villages based on their perceived political opinion – guerilla sympathizers. Therefore, based on the evidence of record – the applicant's own sworn testimony and country condition information, the applicant falls within the group of aliens described in sections 208(b)(2)(A) and 212(a)(3)(E)(iii) of the Act. He is barred from receiving TPS in the United States. The applicant has failed to prove by a preponderance of the evidence that the persecutor bar does not apply to him.

The applicant also fails to provide any reasons for reconsideration that are supported by pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy. The applicant fails to provide pertinent precedent decisions or evidence that establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(b)(6)

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO, dated August 24, 2011, is affirmed. The application is denied.