



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **MAR 20 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:

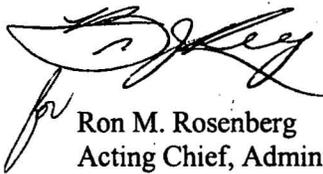
[REDACTED]

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.

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 denied the applicant's TPS because it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others.

On appeal, counsel for the applicant 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 and that the applicant's service at a time of civil war in El Salvador does not amount to persecution of others. Counsel contends that the evidence in the record supports the applicant's repeated denial of participating in persecutory acts during his service in the El Salvador military and that the director did not set forth facts to establish that the applicant participated in the persecution of others on account of a protected ground. Counsel indicated at part 2B of the Form I-290B that he will submit a brief and/or additional evidence to the AAO within 30 days of filing the Form I-290B. No evidence or brief has been submitted into the record. The AAO will consider the record as complete and will adjudicate the matter based on the evidence of record.

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 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 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

At his asylum interview on September 14, 2010, the applicant testified to the following:

That he served as a soldier in the military of El Salvador from 1988 to 1990. He was trained in combat and the use of the M-16. He was stationed at various Departments in El Salvador including, [REDACTED] and [REDACTED] in the state of Santa Ana. He was involved in combat against the Farabundo Marti National Liberation Front (FMLN) guerillas in [REDACTED] and [REDACTED]. His duties includes patrolling outside the military base in villages, arresting of individuals perceived to be guerrillas, preparing bombs for the canons when needed during combat and arresting and guarding prisoners. The applicant stated the Military Intelligence Unit within his cartel was in charge of dealing with prisoners and that they turned over arrested individuals to this unit.

The applicant stated that he was briefly assigned to the cavalry and then transferred to the [REDACTED] where he served for most of his military service. He stated that his commander was [REDACTED] but there was a second [REDACTED] in their brigade by the name of [REDACTED]. The applicant stated that during one of his patrols, he observed a military intelligence unit, department two of his cartel, take four men away in a van and when they returned to the base, the men were not in the van.

The applicant believed that the men were killed by the officers. The applicant described an instance where he was guarding a naked female prisoner whose hands were tied together and she was placed in a very small cell with water dripping from the wall. The prisoner asked to use the bathroom, but the applicant refused to let her use the bathroom because he was told not to talk to the prisoner. The applicant later provided information about the prisoner to the military intelligence unit and the prisoner was taken out of the cell the next day and driven out of the base. The applicant believed that the prisoner was killed and her body thrown into the "lava", a known place where the military disposed of dead people. The applicant stated that he was aware that the military intelligence unit arrested individuals suspected as guerillas and tortured and or killed them.

In a sworn statement dated April 14, 2010, the applicant recounted an incident where a guerilla infiltrated his unit and his commander ordered them to kill the guerrilla, and other people from his village because "they were with the guerillas." The applicant stated "in his village the majority of the villagers were with the guerrillas. We shot at them, there was an hour and a half of shooting and he died and almost all of his family died." In a sworn statement dated September 14, 2010, the applicant recounted another incident in [REDACTED] and [REDACTED] in [REDACTED] when they were ambushed by the guerillas. He stated that the battle lasted between 8-10 days and the El Salvador Air Force was called upon to help them. The applicant stated:

. . . when we came in they were waiting for us, the first confrontation was very strong, there was no way to get into the capital, they put barriers on all areas . . . the guerrillas went into the houses and broke doors, ran from one house to another and we followed them but they would hide in the crowds so we couldn't shoot at them, but we were told to shoot whatever moved . . . this is a situation very critical, because I saw my soldiers die there were other soldiers part of my family who were picking up weapons . . . we captured a commandant of the guerrillas and they got information out of her. . ."

The El Rescate database reports of various human rights violations committed by the Salvadoran military and specifically identified the [REDACTED] actions in [REDACTED] and other departments. The applicant described at least two encounters between his unit and the guerillas in [REDACTED] in [REDACTED] that were reported in El Rescate database as violations of human rights. The applicant stated that he served in the [REDACTED] from [REDACTED] and that he was stationed in [REDACTED] [REDACTED] and [REDACTED] and in [REDACTED]. The applicant testified to [REDACTED] indiscriminate military attacks in [REDACTED] and [REDACTED] when they were ambushed by the guerillas and they were ordered to "shoot whatever moved." By his own admission, the applicant's unit was implicated in the El Rescate database as having committed human rights violations.

The Director, Vermont Service Center, in issuing his decision to withdraw the applicant's TPS, determined that in light of the country conditions information provided by El Rescate database



and the applicant's testimonies at his asylum and TPS interviews that it appears highly unlikely that the applicant did not participate in persecutory acts from 1988 to 1990. The director also determined that the applicant served in a unit of the Salvadoran military that was implicated in human rights abuse during the period the applicant served in the military. The director noted that the burden of proof is 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 because he assisted or otherwise participated in the persecution of others.

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 case of *Federenko v. United States*, 449 U.S. 490 (1981) has provided guidance in interpreting the persecutor base. Following the *Federenko* decision, lower courts have expanded 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 (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) 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. The 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).

In this case, the applicant has testified under oath that he participated in combat against the guerrillas where his commandant ordered them to "shoot at anything that moved." He admitted that his unit arrested at least one individual and turned him over to the Military Intelligence Unit and that he did not know the fate of that individual. The applicant also admitted that his unit was instructed to kill a guerilla that infiltrated their unit as well as members of his family and other villagers because "they were with the guerillas." The applicant also testified that he denied a prisoner the use of a bathroom because he was instructed not to talk to her and later provided information to the Military Intelligence Unit about the prisoner that resulted in the death or the disappearance of the prisoner. The applicant testified that they were instructed to arrest individuals who they perceive to be members of the guerilla or guerilla sympathizers based on their perceived political opinion – supporting the guerillas.

By his own admission, the applicant voluntarily involved himself in the arrest, and indiscriminate killings of innocent civilians based on their preserved political opinion. The applicant provided information that led to the extrajudicial killing or disappearance of a prisoner and according to country condition information, the applicant's unit was implicated in various human rights violations during the civil war in El Salvador. 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).

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 establish that he did not persecute or assist in the persecution of others. The applicant has not overcome the basis of the director's withdrawal of his TPS; therefore, the director's decision 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