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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **MAY 28 2013**

Office: NESBRAKA 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. § 1254

ON BEHALF OF APPLICANT: Self-represented

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,

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

Ron M. Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant claims to be a native and citizen of Haiti 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 because the applicant had one or more felony convictions in the United States, and because it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others.

On appeal, the applicant submits a brief disputing the director's findings. In the alternative, the applicant asserts that he has many equities that weigh in favor of positive exercise of discretion for a grant of TPS.

The AAO has reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

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).

Section 244(c)(2)(B) of the Act states:

Aliens ineligible. – An alien shall not be eligible for temporary protected status under this section if the Attorney General, now Secretary of Homeland Security (Secretary) finds that –

- (i) The alien had been convicted of any felony or 2 or more misdemeanors committed in the United States, or
- (ii) The alien is described in section 208(b)(2)(A).

Section 208(b)(2)(A) of the Act, as it applies to TPS, bars aliens who have been convicted of aggravated felonies:

(A) In general...

- (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States...

¹The AAO conducts appellate review on a *de novo* basis. 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).

(B) Special rules.-

(i) Conviction of aggravated felony.- For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

A “felony” for TPS purpose is defined under Title 8 CFR part 244.1:

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.

Further, section 101(a)(43)(G) of the Act defines “aggravated felony” to include a “theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least I year.”

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.

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 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.

The first issue to be addressed in this matter is whether the applicant’s criminal convictions render him inadmissible and therefore ineligible for TPS.

The record of proceeding contains court documentation from the Supreme Court of the State of New York, [REDACTED] Case No: [REDACTED] dated March 1, 2007, which indicates that the applicant has been convicted on his plea of guilty of: 1) one count of grand larceny in the first degree, a violation of New York Penal Law 155.42, a Class B felony; 2) three counts of falsify business records in the first degree, a violation of New York Penal Law 175.10, Class E felonies; and 3) one count of forgery in the second degree, a violation of New York Penal Law 170.10, a Class D felony. The applicant was sentenced to serve one to three years on each count. The court ordered the sentences imposed to run concurrently with each other.

The record of proceeding also contains court documentation from the Supreme Court of the State of New York, [REDACTED] Case No. [REDACTED] dated October 28, 2008, which indicates that on October 28, 2008,² the applicant was convicted of the following offenses committed between February 8, 2002 and December 22, 2004: 1) scheme to defraud in the first degree, a violation of New York Penal Law (NYPL) 190.65(1); 2) grand larceny in the third degree, a violation of NYPL 155.35; 3) two counts of grand larceny in the second degree, a violation of NYPL 155-40; and 4) and two counts of falsifying business records in the first degree, a violation of NYPL 175.10. The applicant was sentenced to serve a minimum of 1½ years to a maximum of 15 years.³

In her decision, the director noted that the judgments each imposed sentences of one year or more and meet the definition, for immigration purposes, of a “conviction” under section 101(a)(48)(A) of the Act. The director also noted that these convictions are felonies for TPS purposes and that first and second degree grand larceny offenses meet the definition of an aggravated felony, for which no waiver is available. Section 244(c)(2)(A)(iii)(I) of the Act.

On appeal, the applicant asserts that his conviction of grand larceny in the first degree in Case no. [REDACTED] is not an aggravated felony as defined by section 101(a)(43)(G) of the Act. The applicant asserts, in pertinent part, that a modified categorical approach analysis of the indictment and sentencing minutes shows that the violation at issue explicitly reveals that “the property was obtained with the consent of the owner.” The applicant, citing case law, asserts that the victim, a mortgage institution, “relied on the misrepresentations to authorize a loan and subsequently released the funds. Hence, consented to the loan, gratented [sic] by the pledge property.”

The applicant’s assertion, on appeal is specious. If the applicant had not misrepresented a material fact the victim would not have consented to the release of funds. The applicant has not shown that his offense did not involve intent to deprive the owner of possession permanently.

² The applicant initially pled guilty on February 6, 2007, to one count of grand larceny. On May 22, 2007, the court vacated the plea and all counts of the indictment were reinstated.

³ The record reflects that the applicant is currently incarcerated and that the appeal of his conviction is still pending.

The indictment (1843A-2006) indicates that the applicant and other defendants, “while acting in concert with each other and others and pursuant to a common scheme and plan, stole property having an aggregate value exceeding one million (1,000,000) dollars, namely, a quantity of United States currency from [REDACTED]” It is noted that the applicant pled guilty to the offences as noted in the indictment.

Larceny is defined in NYPL section 155.05 as “when, with the intent to deprive another of property or to appropriate the same to himself or to a third person, [a person] wrongfully takes, obtains or withholds such property from an owner thereof.” Deprive is defined in paragraph 3 of NYPL section 155.00:

To “deprive” another of property means (a) to withhold property or cause it to be withheld from another permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to the owner, or (b) to dispose of the property in such a manner or under such circumstances as to render it unlikely that an owner will recover such property.

At the time of the applicant’s conviction, NYPL § 155.42 provided, in pertinent part:

A person is guilty of grand larceny in the first degree when he steals property and when:

1. The value of the property exceeds one million dollars.

In *Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000) , the Board of Immigration Appeals (BIA) addressed the question of what constitutes a “theft offense” for purposes of section 101(a)(43)(G) of the Act and concluded, after an exhaustive analysis of relevant authorities, that “a taking of property constitutes a ‘theft’ whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.” New York courts have indicated that larcenous intent is shown when the defendant intends to exercise control over another’s property for an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. See *People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). In *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3rd Dept. 1983) the court found that to warrant a larceny conviction, intent to permanently deprive the owner of his property must be established and that a temporary withholding of property, by itself, would not constitute larcenous intent. In *Ponnapula v. Spitzer*, the Second Circuit Court of Appeals found that the acts covered by NYPL section 155.00 are permanent takings that manifest larcenous intent. 297 F.3d 172, 183-84 (2nd Cir. 2002). The court observed that while the intent to temporary deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time. *Id.* at 184.

Thus, the AAO finds that the applicant was convicted of grand larceny under NYPL Law section 155.42, as the court determined that the applicant intended to permanently take another person's property. Consequently, the director's decision to deny the application on this ground will be upheld.

The applicant in this matter is also found inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to his conviction for a crime involving moral turpitude. The term "crime involving moral turpitude" is not defined in the Act or the regulations, but has been part of the immigration laws since 1891. *Jordan v. De George*, 341 U.S. 223, 229 (1951) (noting that the term first appeared in the Act of March 3, 1891, 26 Stat. 1084). The Ninth Circuit Court of Appeals, within whose jurisdiction this case arose, has described a crime of moral turpitude as "one 'involving conduct that is inherently base, vile, or depraved, and contrary to the private and social duties man owes to his fellow men or to society in general.'" *Alvarez-Reynaga v. Holder*, 596 F.3d 534, 537 (9th Cir. 2010). A crime involving moral turpitude must involve both reprehensible conduct and some degree of scienter, be it specific intent, deliberateness, willfulness or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1, 706 (A.G. 2008).

When determining whether a crime involves moral turpitude, we first examine the statute of conviction to see if it categorically involves moral turpitude. *Id.* at 696; *Matter of L-V-C-*, 22 I&N Dec. 594, 603 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989). Larceny, as defined in the New York Penal Law involves the "intent to deprive another of property or to appropriate the same to himself or to a third person, [a person] wrongfully takes, obtains or withholds such property from an owner thereof." The AAO notes that although NYPL section 155.42 does not make a clear distinction as to whether a conviction under this section of the statute constitutes a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended. The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Therefore, larceny is a crime involving moral turpitude. *Matter of De La Nues*, I. & N. Dec. 140, 145 (BIA 1981) ("Burglary and theft or larceny, whether grand or petty, are crimes involving moral turpitude"); *Blumen v. Haff*, 78 F.2d 833 (9th Cir. 1935);

The U.S. Supreme Court in *Jordan v. De George* concluded that "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). The crime of forgery is also a crime involving moral turpitude. *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); *Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973); *Animashaun v. INS*, 990 F.2d 234 (5th Cir. 1993).

As the applicant was convicted of a crime which categorically involved moral turpitude, his conviction renders him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the

Act. The applicant is ineligible for a waiver of his inadmissibility because his conviction is also an aggravated felony, specifically, grand larceny and forgery, as defined at Section 244(c)(2)(A)(iii)(I) of the Act.

The second issued to be addressed is this proceeding is whether the applicant ordered, incited, assisted or otherwise participated in the persecution of others.

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 – (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 record of proceedings reflects that the applicant stated that he was [REDACTED] of the [REDACTED] in August 1993. The applicant claims that [REDACTED] is a political organization and denies all allegations that [REDACTED] is an armed paramilitary group which has committed serious human rights abuses. The applicant claims that he never directed any member of [REDACTED] to commit murder, rape, torture or any other violations. He further stated that he was not aware that any member of [REDACTED] had committed human rights violations.

Reports from United States Department of State, Bureau of Democracy, Human Rights and Labor, Haiti Country Report 1994, Human Rights Watch, Amnesty International, and other International human rights organizations, indicated that [REDACTED] was implicated in widespread human rights violations in Haiti during the 1990s. For example, the Amnesty International (AI) 1995 Report on Haiti indicates that members of a political party formed in 1993 as the [REDACTED] renamed in 1994 as the [REDACTED] were involved in hundreds of extrajudicial executions and “disappearances” during the year. The U.S. based Center for Constitutional Rights, reports that “FRAPH [REDACTED] met with an unidentified military officer on the morning of 14 October to discuss plans to kill [REDACTED]

⁴ It is noted that the applicant was residing in the United States at the time of the trial and he was found guilty *in absentia*.

In his application for Motion to Reopen/Motion to Change Venue; and Request for Stay of Deportation and asylum application before the Executive Order of Immigration Review (EOIR), in Baltimore, Maryland, the immigration judge (IJ) noted that the applicant is a [REDACTED] of [REDACTED] an organization that has operated within his home country, Haiti. The IJ stated in pertinent part:

[USCIS] charges that [REDACTED] is statutorily barred from asylum because he has [REDACTED]

The Court finds that there is sufficient evidence in the underlying record of proceedings and sufficient allegations in the international community to conclude that [REDACTED] is an organization that is prone to violence, is willing to violate human rights of Haitians, and is responsible for rape, torture, and death. [REDACTED] has been disbanded by the current Haitian government.

The IJ cited to various international human rights reports and statements from the United States government as supportive evidence that [REDACTED] is a paramilitary organization that has committed various human rights abuses in Haiti and the applicant is barred from receiving an immigration benefit – asylum in the United States because [REDACTED]

The IJ specifically cited to a letter from the then Secretary of State, Warren Christopher, who declared among other things that “. . . [REDACTED] for many Haitians symbolizes the antithesis of democracy,” and that the Department of State regarded [REDACTED] “. . . as an illegitimate paramilitary organization whose members were responsible for numerous human rights violations in Haiti in 1993 and 1994.”

The IJ found the applicant ineligible for refugee status under section 101(a)(42)(B) of the Act because:

Except for [REDACTED] testimony, no evidence has been presented to rebut the allegations that [REDACTED] persecutes others. Furthermore, [REDACTED] an organization clearly banned by the duly elected government of Haiti. On the contrary, [REDACTED] and his [REDACTED] with the organization since his arrival in the United States....⁵ As such, [the applicant] has failed to prove by a preponderance of the evidence that he did not commit such acts of persecution as supported by the underlying record of deportation proceedings.

The Director, Nebraska Service Center, in issuing her decision to deny the applicant's TPS, determined that in light of the reports from various international human rights organizations, the record of the applicant's removal proceedings, the decision from the IJ and the applicant's own testimony, that the record establishes that the applicant ordered, incited, assisted or otherwise participated in the persecution of others on account of race, religion, nationality, membership in

⁵ The applicant arrived in the United States on December 24, 1994, as a non-immigrant visitor.

a particular social group or political opinion. The director noted that the applicant is barred from TPS as a persecutor.

On appeal, the applicant asserts that the facts alleged in the director's decision do not constitute evidence that he ordered, incited or otherwise assisted in the persecution of persons to invoke the persecutor bar. The applicant, citing case laws, asserts that USCIS failed to establish that his conduct amounts to the persecution of others, and that the various international human rights reports are inadmissible hearsay evidence and fail to demonstrate that he is a persecutor. Other than his statements and allegations, the applicant does not provide credible documentary evidence to rebut the director's finding that he persecuted 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) provided guidance in interpreting the persecutor bar cases. Following the *Federenko* decision, many lower courts have expanded the persecutor bar so that personal involvement in killing or torture is not 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) 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 Rodriquez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988). It is notable that there is no mens rea requirement for the persecutor bar to apply and that the alien's actions need not be of his own volition. See *Id.*(citing *Federenko*, *supra*).

In this case, the applicant was a co-founder of [REDACTED] a paramilitary organization that has been well documented as being involved in numerous human rights violations in Haiti during the 1990s, when the applicant was residing in Haiti. The applicant was specifically implicated in the extrajudicial killing of at least one person, [REDACTED]. The record of proceedings reflects that numerous incidents of human rights violations by members of [REDACTED] occurred when the applicant was in charge of the group. According to various country condition reports and reports from reputable international human rights organizations, the applicant must have been aware that members of his organization committed various human rights abuses on innocent civilians and political opponents. 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). As such the applicant assisted and/or otherwise participated in the persecution of others. The applicant's argument that he was not personally involved in any persecutory act is not persuasive as the law does not require personal involvement for the persecutor bar to attach.

The director also denied the TPS application as a matter of discretion. The director determined that the applicant's criminal convictions and persecutory bar, in addition to being statutory bars to TPS, "also speak decisively against the favorable exercise of discretion." On appeal, the applicant has submitted no evidence to overcome this basis for the denial of his TPS application. The AAO agrees with the director that the negative factors far outweigh any positive factors that may be available in this case.

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 provided any evidence to overcome the grounds for the denial of the application. Consequently, the director's decision to deny the application for TPS will be affirmed.

The application will be denied for the above-stated reasons with each considered as an alternative and independent basis for denial. 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.