



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 03 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.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron M. Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was denied 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 did not participate in any persecutory acts or torture of any person because he left the military after three months of basic training. Counsel contends that since the applicant did not participate in any combat, he could not have ordered, incited, assisted or otherwise participated in the persecution of others and therefore should not be barred from receiving TPS. Counsel submits a brief and a Declaration from the applicant in support of the appeal.

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; and
- (f)
 - (1) Registers for TPS during the initial registration period announced by public notice in the *Federal Register*, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:

- (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for reparole; or
 - (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

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 interview on April 3, 2006 for suspension of deportation or special rule cancellation of removal under section 203 of NACARA, the applicant testified under oath before an immigration official that he was forcibly recruited into the armed forces of El Salvador and that he served in the military for one year, from April 1984 to April 1985. The applicant stated that he was stationed in [REDACTED] under the leadership of [REDACTED]. The applicant indicated that he received three months of military training in the following areas: the use of weapons such as M-16, M-60, AK-47 and Uzi and how to fire these weapons; bullet proof test (how to dodge bullets); how to mine locations with C-4 land mines; sharp shooting; self-defense and how to provide aid to wounded persons. The applicant testified that after training, he was sent to the hills to fight the enemy. The applicant stated that although he received training on how to lay landmines, it was the Corporal in his group who actually laid the landmines. The applicant testified that the Corporal mined the countryside where he thought the enemy would pass. The applicant stated that he participate in combats, guarded cities and outposts and maintained order in the area they were posted. He accomplished these duties by arresting individuals who he perceived as "creating a public disorder." The applicant described an incident when his group encountered a group of individuals on a boat during one of his combat operations whom they perceived were enemies. The applicant stated that his group engaged these individuals in a fire fight, two people were killed, one was shot and injured, two escaped and two were arrested. He indicated that the arrested men were turned over to the Brigade and that he did not know what happened to those men. The applicant denied having arrested a prisoner during combat but admitted that he once arrested and handcuffed a man who was drunk. Regarding this arrest, the applicant declared:

The young man was drunk and looking for problems with another person. I talked to him, but he didn't pay attention, so I handcuffed him. . . I called the Brigade so they could take him.

The applicant further testified that he observed some of the soldiers in his Brigade kick, beat, mistreat, and /or assault prisoners and other individuals with their feet, fists and their guns out of anger because these individuals may have killed members of the soldier's family or because of "previous problems" but that he never participated in the mistreatment of anyone. The applicant claimed that his Lieutenant once asked him if he wanted to beat a prisoner and he told him no.

The El Rescate database¹ reports of various human rights violations committed by the Salvadoran military in [REDACTED] during the period the applicant served in the military. The El Rescate database reported of at least three specific incidents of human violations against

¹ *<http://www.elrescate.org/about.html>

civilians by the applicant's Battalion. By his own testimony, the applicant was involved in the arrest of two individuals he perceived to be enemies during a combat, and a civilian he claimed was drunk and not responding to his command. These individuals were handed over to the Brigade and the applicant claimed he did not know what happened to them. The applicant's group participated in the laying of landmines in areas that innocent civilians used, knowing the serious injuries and or death that will result from the landmines. In addition, the applicant was aware of the mistreatment of prisoners and civilian by member of his Brigade. 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 deny the applicant's TPS, determined that in light of the country conditions information provided by the El Rescate database and the applicant's testimony at his suspension of deportation or special rule cancellation of removal hearing under section 203 of NACARA, the applicant is an alien 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. 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 and denied his application.

On appeal, counsel denies the applicant's involvement in any persecutory acts against any one. Counsel claims that the applicant's involvement in the Salvadorian military was only for three months basic training, that the applicant did not participate in any combat and therefore could not have participated in any human rights violations. Counsel submitted a brief on appeal. In his brief, counsel reiterated his claim that the applicant served only three months in the Salvadoran military, that the extent of his service was basic training and that he left the military after the three month training period. Counsel further asserts that the applicant served in the military during a civil conflict between the military and the guerrilla group and that violence resulting from civil war does not constitute persecution. In addition, counsel claims that even if the applicant's unit was implicated in human rights violations, that the applicant was not personally involved in any persecutory acts. Counsel cited several cases in support of his assertions and his arguments.

On appeal, the applicant submitted a "Declaration" in support of his appeal and counsel's assertions that the applicant had limited involvement in the Salvadoran military. The applicant stated that he was in the Salvadoran military for four months, from April to July 1985. The applicant declared "during my four months of training, I was assigned to the [REDACTED] . . . I was given only basic training and nothing more. . . I did not participate in any hostilities, never used any weapons, never harmed or beat anyone. . . I never persecuted, harmed, attacked, or hurt anyone for any reason whatsoever. . . I ran away from the army and did not return." The applicant submitted a document from the Social Security Institute of the Armed Forces of El Salvador that was issued on October 8, 2012, which indicated that the applicant "made four payments from April 1985 through July 1985."

In order to determine whether an applicant “assisted or otherwise participated in persecution,” the courts have assessed whether the conduct in question is “active and had direct consequences for the victims” or whether the conduct is “tangential to the acts of oppression and passive in nature...” *Xie v. INS*, 434 F.3d 136 (2nd Cir. 2006); *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 bar case. In *Federenko*, the Supreme Court provided the framework for determining whether an individual has assisted in the persecution of others.² In *Federenko*, the Supreme Court held that a Ukrainian Nazi concentration camp guard had assisted in the persecution of others, though he claimed to have been captured and forced into service by the Nazis. The Court determined that Congress would have included an involuntariness exception in the statute if that had been Congress’ intent and concluded that “an individual’s service as a concentration camp armed guard – whether voluntary or involuntary – made him ineligible for a visa. *Federenko*, at 512. Following the *Federenko* decision, lower courts have expanded the persecutor bar so that personal involvement in killing or torture is no longer necessary for a finding that an alien assisted in persecution. 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), and 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). The Board of Immigration Appeals (BIA) has provided guidance in determining whether acts committed in the context of a civil strife amount to persecution or not. In *Matter of Rodriguez-Marjano*, 19 I&N Dec. 811, 815 (BIA 1988), the BIA 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 instructed 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*, id. In *Matter of Maldonado-Cruz*, 19 I&N Dec. 509 (BIA 1988), the Board held that “in analyzing a claim of persecution made in the context of the civil war, it is necessary to examine the motivation of the group threatening harm.

In this case, the applicant testified under oath that he participated in combat against individuals perceived as “the enemy” and during one of the combats; he and members of his group arrested some prisoners and handed them over to their Brigade for further action. The applicant admitted to arresting a civilian who was drunk and disobeyed his command and handed this civilian to his Brigade for further action. The applicant denied knowledge of what ultimately happened to these individuals. The applicant also testified that his group laid landmines in the countryside where innocent civilians reside without regards to possible injuries and or death to the civilians living in the area. Further, the applicant testified that he was aware of human rights abuses against prisoners and civilians by member of his Brigade.

² This case involved a similar but not identical bar to relief under former Section 241(a)(19) of the INA (now codified at INA 237(a)(4)(d)). The bar applies to any alien who, in conjunction with the Nazi government or an associated government, “ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.”

We note that although the applicant denied involvement in any persecutory acts, he submitted statements and other documents on appeal that are contradictory to his April 3, 2006 Sworn Statement. Whereas the applicant provided detailed testimony of his one year service in the Salvadoran military relating to weapons and other military training and combat operations, he claimed on appeal that he only served three/four months in the military, that he received only basic training (no details was provided about the nature and extent of the training), that he did not participate in any combat, that he did not participate in the arrest of prisoners and that he fled the military at the end of his basic training. The inconsistencies call into serious question the credibility and the reliability of the evidence submitted by the applicant in support of his application and his claim that he did not participate in the persecution of others. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

By his own admission, the applicant served in a Brigade that was implicated for various human rights violations during the civil war in El Salvador. The applicant participated in the arrest of prisoners, including at least one civilian and handed them over to the Brigade. The applicant was aware of human rights violations committed by some members of his group, and his group participated in laying landmines in areas where civilians reside. 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 credible and probative evidence to establish that he did not persecute or assist in the persecution of others.

In visa petition proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The applicant has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed