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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: **APR 08 2014** 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 (AAO) 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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant claims to be a 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 because: 1) it was determined that the applicant ordered, incited, assisted or otherwise participated in the persecution of others; 2) of the applicant's misdemeanor convictions; and 3) the applicant was found inadmissible under section 212(a)(6)(C) of the Act.

On appeal, counsel asserts that the applicant has established his eligibility for TPS. Counsel states that the applicant has only one misdemeanor conviction for driving under the influence in California, as he has been granted a pardon for one of his convictions in Georgia. Counsel argues that there is no evidence that the applicant participated in any activity that would trigger the persecutor bar, and puts forth a brief disputing the director's finding.

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.

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 AAO conducts appellate review on a *de novo* basis. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record reflects that the applicant submitted a TPS application on October 30, 2008, under receipt number [REDACTED] and it was accepted under the late registration provisions pursuant to 8 C.F.R. § 244.2(f)(2)(ii). The director denied the application on July 8, 2009, because the applicant had been convicted of at least two misdemeanor convictions, and because the director deemed the applicant a persecutor and therefore, barred from TPS. The director also found the applicant inadmissible under section 212(a)(6)(C) of the Act due to his failure to disclose his arrests and service in the El Salvadoran military on that TPS application. No appeal was filed from the denial of that application.

The applicant submitted this TPS application on December 20, 2011, and indicated that it was his first application to register for TPS.

The first issue to be addressed is whether the applicant is subject to the persecutor bar.

The applicant admitted in a sworn statement on November 28, 2005 and testified to an asylum officer on August 13, 2008, that he had served in the El Salvadoran military as a radio dispatcher from 1986 through 1989 with the [REDACTED] in San Salvador. The applicant testified that he was trained for one year before being sent to the field. The applicant testified that after training he was assigned to a radio dispatch unit where he received and transmitted messages via radio to military units. The applicant testified that he never transmitted messages about civilians and was not aware of any mistreatment of captives or civilians, and he did not witness any civilians or guerillas being captured, interrogated or tortured, and that he was not aware of any human rights violations. The applicant testified that he was not involved in combat. The applicant testified that on one occasion he encountered the enemy while training his unit and was attacked; and on that occasion he had a gun but he ran for cover because although he had a gun it did not have bullets and he could not defend himself.

In his removal/exclusion hearing the applicant reiterated his claim of service in the El Salvador army from 1986 through 1989. He testified that during his service he served as a radio dispatcher transmitting messages to and from various military units; that he never transmitted messages about civilian captives; that he never witnessed or heard of any abuse by the military; and that he was not aware of any human rights violations.

In issuing his decision on July 8, 2009, the director noted that according to the [REDACTED] during the timeframe that the applicant served, the [REDACTED]

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[REDACTED] participated in human rights violations. The applicant denied participating in human rights abuses during his military service. However, the director determined that the persecutor bar applies even if the applicant did not personally commit the persecutory act. In light of country conditions as indicated in the [REDACTED] the director concluded that it was likely that the applicant 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 director, in his decision of April 23, 2012, determined that the applicant had not provided any new and compelling evidence that overcame the reasons for the denial of his initial application. The director concluded that the applicant was not eligible for TPS as he was an alien described in section 208(b)(2)(A)(i) of the Act.

The record reflects that the applicant filed another TPS application [REDACTED] on March 23, 2012. The Form I-821 states, at Part 4, Eligibility Standards, Question 2, that:

If any of the questions beginning below on this page and continuing on Page 3, 4, and 5, apply to you, describe the circumstances and include a full explanation on a separate sheet(s) of paper. Use the number 2 before each letter referring to the specific question (2a, 2b, etc.).

Part 4, Question 2p, asks:

Have you EVER ordered, incited, called for, committed, assisted, helped with, or otherwise participated in any of the following:

...

(ii) killing any person?

(iii) intentionally and severely injuring any person?

At the time of completing that TPS application [REDACTED] for each of the questions 2p (ii), and 2p (iii), the applicant indicated "YES."

On January 6, 2014, the AAO sent a notice informing the applicant that because he had answered "yes" to both of the questions, the instructions required that he was required to describe the circumstances and include a full explanation on a separate sheet(s) of paper. The applicant was further informed that the record did not include any of the required descriptions of the circumstances and a full explanation on a separate sheet(s) of paper.

The applicant was advised that it was imperative for the AAO to determine that the statements made in support of the TPS application were consistent with the evidence in the record. Thus, in order to meet his burden of establishing eligibility for TPS, the applicant was granted 15 days to

order to meet his burden of establishing eligibility for TPS, the applicant was granted 15 days to provide to the AAO statements describing the circumstances and a full explanation for each of questions 2p (ii), and 2p (iii).

In response, the applicant asserted, in pertinent part:

First, I want to be very clear that I have never killed or hurt anyone, ever - not in war nor in peace. I have never used a gun, knife, or any type of weapon to ever hurt or kill another human being – not during combat, when I was a member of the El Salvador military, nor as a civilian in El Salvador or the U.S.

However, because I was a member of the Salvadoran military, I think, *by definition*, I must have “helped with” the effort to kill and injure guerillas, although in a very indirect way. I think any member of the Salvadoran armed forces, no matter what the job duties, had to have helped with killing and injuring guerillas. That is why I answered those two questions, p(ii) and p(iii) as “yes.”

In *Matter of Rodriguez-Mejano*, 19 I&N Dec. 811, 814-15 (BIA 1988), it was held that if an applicant’s action or inaction furthers persecution in some way, he or she is ineligible for relief. However, mere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief. Therefore, the applicant’s membership in an El Salvadoran military unit is insufficient, by itself, to invoke the persecutor bar

Mere association with an organization that engages in persecution is insufficient to trigger the bar). *Xu Sheng Gao, v. U.S. Atty. Gen.*, 500 F.3d 93, 99 (2d Cir. 2007). In *Miranda-Alvarado v. Gonzalez*, 449 F.3d 915, 927 (9th Cir. 2006), it was held that “determining whether a petitioner ‘assisted in persecution’ requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability [m]ere acquiescence or membership in an organization is insufficient to satisfy the persecutor exception.” In *Singh v. Gonzales*, 417 F.3d 736 (7th Cir. 2005), it was held that simply being a member of a local Punjabi police department during the pertinent period of persecution is not enough to trigger the persecutor bar.

To be statutorily ineligible for TPS, section 208(b)(2)(A)(i) of the Act specifies that an alien must have “ordered, incited, assisted or otherwise participated in the persecution of any person” While the [redacted] has been cited as evidence that persecutory acts were committed by the [redacted] it did not specifically link the applicant to these acts. Section 208(b)(2)(A)(i) of the Act specifies that an alien must have “ordered, incited, assisted or otherwise participated in the persecution of any person” There is no evidence in the record that the applicant “ordered” or “incited” any persecutory activities. While “assist[ing] or other partipat[ing]” in persecutory activities would require less direct involvement by the applicant, there is no evidence to link the applicant to persecutory activities, at this more attenuated level. To reach such a conclusion would be through a guilty by association link to the [redacted] which has been cited as committing such abuses. However, this would not fall within the

purview of section 208(b)(2)(A)(i) of the Act. Accordingly, the director's decision to deny based on ineligibility under section 208(b)(2)(A)(i) of the Act will be withdrawn.

The second issue to be addressed is the applicant's criminal history.

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).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under the term "felony" of this section. For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 244.1.

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.

The Federal Bureau of Investigation (FBI) report dated December 15, 2009, and the court dispositions in the record reflect the applicant's criminal history as follows:

1. On January 2, 1993, the applicant was arrested by the [REDACTED] Police Department of Georgia for driving under the influence of alcohol, a violation of Georgia Code Ann. § 40-6-391(A)(1), a misdemeanor. According to a letter dated April 1, 2009, from the Municipal Court Clerk of [REDACTED] Georgia, the case was closed in February 1993 with all fines being paid.² The FBI report indicates that on February 25, 1993, the applicant was convicted of this offense, received a six-month suspended sentence and was ordered to pay a fine.
2. On May 29, 2001, the applicant was arrested by the [REDACTED] County Sheriff's Office, [REDACTED] Georgia, and charged with two counts of child molestation, a violation of Georgia Code Ann. § 16-6-4(B), both felonies. On May 8, 2006, the [REDACTED] Judicial Circuit Court entered *nolle prosequi* for the charges of child molestation. Case no. [REDACTED]

² The letter further indicates that the original file for the 1993 offense of driving under the influence was no longer available due to the retention laws of Georgia.

3. On October 24, 2004, the applicant was arrested by the Sheriff's Office, [REDACTED] California, and charged with two misdemeanors: count 1, driving under the influence of alcohol/drug w/priors, a violation of § 23152(a) VC; and count 2, driving under the influence of alcohol/0.08 w/priors, a violation of § 23152(b) VC. On December 21, 2004, the applicant pled guilty to both misdemeanor offenses. Judgment was withheld by the court, and the applicant was placed on probation for 36 months, ordered to attend an alcohol program, served one (1) day in jail, and fined. Case no. [REDACTED]

The applicant provided a document for the Georgia State Board of Pardons and Paroles in which he received a pardon for the offense of driving under the influence that occurred January 2, 1993 for which he was convicted on February 25, 1993. The director determined that as the pardon was not granted by the Governor of Georgia, the misdemeanor conviction remained a conviction for immigration purposes.

The pardon states that it was issued pursuant to Article IV, section II, Paragraph II(a) of the Constitution of the State of Georgia. Article IV, Paragraph II specifies that the Board of Pardons⁴ is vested with powers ...including Pardons. The pardon granted the applicant is unconditional and is an executive pardon duly granted by executive as provided in the Constitution of the State of Georgia. The pardon was duly granted by executive authority. *Matter of Tajer*, 15 I&N Dec 125 (BIA 1974). As the pardon, in the 1993 criminal case, was granted by executive authority, the applicant can no longer remain convicted of the misdemeanor offense for immigration purposes. Accordingly, the director's finding on this ground will be withdrawn.

However, contrary to counsel's assertion on appeal, the applicant remains convicted of two or more misdemeanors. Counsel states that the applicant had two misdemeanor convictions and that as one of his convictions has been pardoned, he is left with one misdemeanor conviction. The court disposition in Case no. [REDACTED] clearly indicates that the applicant pled guilty to violating sections 23152(a) CVC and 23152(b) CVC, and the judge ordered some form of punishment and penalty. For immigration purposes the applicant remains convicted of these misdemeanor offenses within the meaning of section 101(a)(48)(A) of the Act.

The applicant is ineligible for TPS due to two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed. Further, the FBI report indicates that the applicant has prior arrests and/or convictions relating to driving under the influence. Accordingly, the applicant is also ineligible for TPS because of his failure to provide certified court documentation indicating the final dispositions of these prior arrests, which is necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). Therefore, the application must also be denied on this ground.

⁴ The Georgia State Board of Pardons and Paroles is appointed by the Governor.

The third issue to be addressed is the applicant's inadmissibility under section 212(a)(6)(C) of the Act.

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible. Section 212(a)(6)(C)(i) of the Act.

A misrepresentation is generally material only if by it the alien received a benefit for which he/she would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72.

Except as provided in clause (iii), the Secretary may waive any other provision of section 212(a) in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Section 244(c)(2)(A)(ii) of the Act. If an alien is admissible on grounds which may be waived, he or she shall be advised of the procedures for applying for a waiver of grounds of inadmissibility on Form I-601, Application for Waiver of Grounds of Inadmissibility. 8 C.F.R. § 244.3(b)

Due to the applicant's ineligibility for TPS pursuant to section 244(c)(2)(B)(i) of the Act, 8 C.F.R. § 244.4(a) and 8 C.F.R. § 244.9(a), it is not necessary for the AAO to remand the case in order for the director to provide the applicant the opportunity to file a Form I-601.

Finally, while not the basis for the dismissal of the appeal, it is noted that the record reflects that on February 14, 2011, a removal hearing was held and the applicant was granted voluntary departure until April 15, 2011. On March 14, 2011, the applicant appealed the decision of the Immigration Judge. On November 9, 2012, the Board of Immigration Appeals (BIA) dismissed the appeal. The BIA permitted the applicant to voluntarily depart the United States within 60 days from the date of its order.

ORDER: The appeal is dismissed.