

GARY P. MARTIN
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Department of Homeland Security
Immigration and Customs Enforcement
1010 E. Whatley Rd.
Oakdale, Louisiana 71463

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OAKDALE, LA

In the Matter of:)
AYALA-GAMEZ, Henry Alexander) File No.: A209 232 542
In Removal Proceedings)
)
)
)
)

Immigration Judge: **John A. Duck, Jr.**

Next Hearing: **September 6, 2017**
8:30 AM

U.S. DEPARTMENT OF HOMELAND SECURITY'S
REBUTTAL PACKET TO THE POFFERED
"EXPERT WITNESS:" DR. BOERMAN

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A Board of immigration Appeals Decision, A - - 830, November 16, 2016
(unpublished)

- "The Immigration Judge identified appropriate reason for giving the expert witness's testimony and statements less weight."

- * "The Immigration Judge found that Dr. Boerman has for the last 2 years earned his primary income from fees charged for testifying in asylum cases (200) and that he has written several articles regarding gang-based asylum claims for aliens from Mexico and Central America."

- * "The Immigration Judge's finding that Dr. Boerman has displayed bias or a lack of objectivity is a reasonable basis for giving diminished weight to his testimony and statements."

B. Thomas Boerman *Central American Gang Related Asylum Cases: Background, Leverage Points and the Use of Expert Witnesses*, Immigration Daily, <https://www.ilw.com/articles/2009,1215-boerman.shtm> (last visited 8/29/2017)

- * "Given current case law there is a widespread belief that Central American gang related cases are essentially unwinnable ... These cases are essentially unwinnable without engaging a skilled expert who becomes familiar with the circumstances of each case and partners with attorneys to develop strategy and assist in case preparation."

- "Finally, experts may assist attorneys to draft examination questions and prepare respondents and other witnesses for direct and cross examination."

- * Thus far, the spotlight has been on young people fleeing gang recruitment and the court's unwillingness to view these youth as a particular social group is well known (although the re-opening of the *Matter of S.E.G.* provides a basis for cautious optimism).

C Thomas Boerman, *From Persecution to Refugee: The Central American Gang Phenomenon*, American Immigration Lawyers Association, VOICE March/April 2011, pp. 27-31

- * "Attorneys and experts must address the ways in which the ruling has been misinterpreted, and differentiate individual cases from *S-E-G*."

- "(Note: *Matter of S-E-G* has been reopened and there is cause for cautious optimism)"

• "If there is no alternative to a gang based claim, work with experts to ascertain whether there are alternatives to particular social group (PSG) arguments Examples include petitioner who were persecuted, or would be at risk of persecution, because they: (1) reported gang crime to police or cooperated with investigations ... "

• "If no PSG alternative exists, explore groups that address judge's concerns about social visibility, recognizability and particularity, e.g., 'family as social group,' 'economically marginalized youth from homes with no adult male presence,'" Each of these groups has parameters around it, and experts can be used to clarify to the court that members are recognized within their communities and targeted by gangs for reasons that relate directly to their membership in that group."

* "Given the challenges associated with Central American gang-based claims, attorneys are strongly encouraged to enlist the services of experts who are willing to actively partner at multiple stages of the process."

*"the dearth of research and citable resources, coupled with the unfavorable climate of the courts, makes it essential for attorneys to engage experts."

*"Experts can play an important role by interviewing petitioners to establish the credibility of the claim, assisting attorneys to develop case strategy, participating in the development of direct examination questions, and by drafting individualized affidavits ... "

D Thomas Baerman, *Central American Updates: Gang and Organized Crime Based Immigration Claims and the Growing Importance of Expert Witnesses*, Immigration Daily, <http://discuss.ilw.com/content.pbp?2498-Article-Central-America-Updates-Gang-and-Organized-Crime-Based-Immigration-Claims-and-the-Growing-Importance-of-Expert-Witnesses-by-Thomas-Boerman> (last visited 8/29/2017)

*"In addition to providing country conditions information and assisting immigration professionals to contextualize the facts of a case experts are also able to provide a framework for assessing any past threats or persecution, and for making predictions of future risk to respondents beyond that of the general public, if returned."

*"Finally, experts are able to contribute in ways that relate directly to the needs of decision makers by assisting immigration attorneys to: 1. Assess the veracity of respondents' claims; and 2. Gather relevant case information."

*"This does not mean the expert would become involved in witness preparation in any way; that would constitute a serious breach of their professional neutrality and objectivity."

•"About the author ... He can be contacted at boermanthomas@gmail.com"

E. Board of Immigration Appeals Decision, A-- -- 630, November 9, 2012
(unpublished); IJ Decision, A - - 630, June 12, 2012

* BIA stating that "The Immigration Judge's findings of fact, including the finding that the respondent's proposed expert witness was not free of bias, are permissible views of the evidence, and hence not clearly erroneous."

* Decision stating that "Mr. Boerman acknowledged that of the 74 paragraphs in his declaration, 63 are boilerplate that he uses in every case."

* "While presenting himself as an objective social scientist, he admitted that he wrote an article for an AILA publication offering advice on how respondents' attorneys can get around BIA cases rejecting gang-based asylum claims."

*"He wrote another article explaining how paid experts like himself can assist respondents' attorneys in winning gang asylum cases."

*"He has a financial interest in promoting these claims which undermines the reliability of his conclusions."

*"He was asked how many deportees had been tortured or killed and he did not know. He was asked, in light of this, what the basis was for his assertions about what would happen to respondent. He said he had talked to colleagues and had interviewed, over the last five years, about fifty current and former gang members from Honduras, Guatemala, El Salvador and the United States. This evidentiary base is so scanty that no responsible adjudicator could give Mr. Boerman's conclusions meaningful weight."

F IJ Decision, A --- --- 656, October 5, 2009

*"While Dr. Boelman is certainly interested in the topic of gangs in Central America, he has no specialized education or training on the topic. Rather Dr. Boerman holds a Ph.D. in special education."

*"His research deals with general gang culture and intervention approaches, and it is not focused on Central American gangs. His doctoral dissertation was not on the topic of gangs in Central America or Honduras. Indeed, only one of his published articles focuses on this issue."

•"In sum, there is no indication that any of his publications or courses, save for one recent article, dealt specifically with Central American gang issues. Furthermore, his personal visits to Honduras were limited and brief, comprised of only a two month stay in 2005 and five to six days in 2007. Given this record, the

Court concludes that Dr. Boerman's testimony has limited probative value and that he is not an expert on gang issues "

Dated 9-5-2017



GARY P. MARTIN
Assistant Chief Counsel

CERTIFICATE OF SERVICE

On the below date, I mailed or delivered a copy of this submission of documents and any attached pages by emailing a copy, placing said copy in an envelope, and placing said envelope in my office's receptacle designated for official outgoing regular mail, said envelope having been addressed to the respondent at the address indicated:

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Dated 9-5-2017



GARY P. MARTIN
Assistant Chief Counsel

TAB A



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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A [REDACTED]-830

Date of this notice: 11/16/2016

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Creppy, Michael J.

bashorea
Userteam: Docket

Falls Church, Virginia 22041

File: ██████████ 830 – Kansas City, MO

Date: NOV 16 2016

In re: ██████████ a.k.a. ██████████

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Timothy Wichmer, Esquire

ON BEHALF OF DHS: Jennifer A. May
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

Lodged: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] -
Controlled substance violation

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge dated June 30, 2016, which found him inadmissible and subject to removal under sections 212(a)(2)(A)(i)(II) and 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(a)(6)(A)(i), and denied his applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). See sections 208(b)(1)(A) and 241(b)(3)(A) of the Act; 8 C.F.R. §§ 1208.16(c)-1208.18. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues; including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). We adopt and affirm the decision of the Immigration Judge. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994).

The respondent was convicted on June 9, 2015, of possession of a controlled substance, cocaine base, a class C felony, in violation of Mo. Ann. Stat. § 195.202 in the Circuit Court of Saint Louis County, Missouri (Exhs. 3 and 4). Based on this conviction, the Immigration Judge sustained the lodged charge of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, and determined that the respondent was ineligible for cancellation of removal of nonpermanent residents and adjustment of status (I.J. at 2). He found that the respondent had not demonstrated any "realistic possibility" of prosecution under Mo. Ann. Stat. § 195.202 for a substance that is not listed in the Federal Controlled Substances Act ("CSA") (I.J. at 2).

On appeal, the respondent argues that his conviction under Mo. Ann. Stat. § 195.202 has not been shown to be a controlled substance violation under section 212(a)(2)(A)(i)(II) of the Act (Resp. Br. at 6-8). Missouri Statute § 195.202 provides that “Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.” The respondent argues that the particular controlled substance is not an element of the crime and that the Missouri CSA lists Salvia Divinorum as a controlled substance which is not also listed in the Federal CSA (Resp. Br. at 8). The respondent asserts that the least of the acts criminalized, such as possessing a substance listed in the Missouri CSA, for example Salvia Divinorum, would not be included in the generic federal offense. He argues that the particular substance is merely a means of committing an offense under Mo. Stat. § 195.202, and not an element of the offense; the least criminalized controlled substance in the Missouri CSA is not related to a controlled substance in the federal CSA (Resp. Br. at 8). See *United States v. Headbird*, 832 F.3d 844 (8th Cir. 2016) (finding that “the phrase ‘with a dangerous weapon’ is an element of Minnesota’s second degree assault statute, Minn. Stat. § 609.222, subd. 1, and that the separate definition of ‘dangerous weapon’ in § 609.02, subd. 6, lists means for committing that element”).

In *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016), the Supreme Court explained the distinction between “elements” and “brute facts” or “means” as follows:

“Elements” are the “constituent parts” of a crime’s legal definition--the things the “prosecution must prove to sustain a conviction.” At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things--extraneous to the crime’s legal requirements. (We have sometimes called them “brute facts” when distinguishing them from elements.) They are “circumstance[s]” or “event[s]” having no “legal effect [or] consequence”: In particular, they need neither be found by a jury nor admitted by a defendant.

Id. (citations omitted).

In this case, the statute, Mo. Ann. Stat. § 195.202, provides different penalties; any person who possesses 35 grams or less of marijuana or any synthetic-cannabinoid is guilty of a class A felony, whereas the respondent was charged and found guilty of possessing cocaine base, a class C felony¹ (Exh. 4). The jury found the respondent to be guilty of possession of a controlled substance as submitted in jury instruction number 5, which states that on November 29, 2012, the respondent possessed “cocaine base” (Exh. 4). Thus, the particular substance is an element of

¹ Section 195.202 of the Missouri Statute provides that: “1. Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance. 2. Any person who violates this section with respect to any controlled substance except thirty-five grams or less of marijuana or any synthetic cannabinoid is guilty of a class C felony. 3. Any person who violates this section with respect to not more than thirty-five grams of marijuana or any synthetic cannabinoid is guilty of a class A misdemeanor.”

and not a means to commit the crime because there are different penalties depending on the particular controlled substance and the jury was required to find beyond a reasonable doubt that he possessed the particular substance of cocaine base, a class C felony. See *Mathis v. United States*, *supra*; *Matter of Chairez*, 26 I&N Dec. 819, 823 (BIA 2016). Therefore, the Immigration Judge did not err in finding that the respondent is inadmissible under section 212(a)(2)(A)(i)(II) of the Act as an alien convicted of a controlled substance violation.

The respondent challenges the Immigration Judge's determination that he did not timely file his asylum application or present evidence of changed circumstances to excuse the late filing of his application (Resp. Br. at 11-12; Tr. at 91-92). See sections 208(a)(2)(B), (D) of the Act; 8 C.F.R. § 1208.4(a). The respondent entered the United States in 2001 and did not file his application until 2015. The respondent argues that the conviction and imprisonment of his brother Eusebio in Mexico in 2013 and his marriage in 2013 constitute changed circumstances materially affecting his eligibility for asylum (Resp. Br. at 12). We affirm the Immigration Judge's finding that neither the conviction and incarceration of the respondent's brother or his marriage to his United States citizen spouse constituted changed circumstances which materially affected his eligibility for asylum. (I.J. at 8). Section 208(a)(2)(D) of the Act; 8 C.F.R. § 1208.4(a)(4). Therefore, the respondent is statutorily ineligible for asylum.

We also affirm the Immigration Judge's determination that the respondent did not meet his burden of proof for withholding of removal (I.J. at 9-10). Section 241(b)(3)(C) of the Act. The Immigration Judge correctly determined that the respondent did not meet his burden to establish the required nexus between any past or feared harm in Mexico and one of the grounds enumerated in the definition of "refugee." Section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42). On appeal, the respondent claims that he was persecuted and fears future persecution on account of his actual or imputed political opinion or membership in four particular social groups defined as (1) immediate family of Eusebio Jimenez," (2) "immediate family members of a gang member," (3) "immediate family members of gang victims," and (4) "Mexicans returning from a long-time residence in the United States" (I.J. at 10-11; Resp. Br. at 15-19; Tr. at 56-60). We agree with the Immigration Judge that the respondent failed to establish that his membership in a particular social group, or any other actual or imputed protected ground, was or will be at least one central reason for any persecution in Mexico (I.J. at 10-14). Section 241(b)(3)(C) of the Act; *Matter of C-T-L-*, 25 I&N Dec. 341, 343 (BIA 2010); *Matter of W-G-R-*, 26 I&N Dec. 208, 223 (BIA 2014). A "persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error." *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011).

The respondent argues that he was harassed and persecuted by a gang member named Omar Ballo ("Ballo") who was a rival of his brother, and by police in Mexico.

We find no clear error in the Immigration Judge's determination that the respondent did not establish that it is more likely than not that he will be persecuted in Mexico on account of his family relationship to his brother (I.J. at 10-11). 8 C.F.R. § 1003.1(d)(3)(i). The respondent did not establish that any past or feared harm was or would be motivated by animus towards any of the proposed family-based particular social groups and did not demonstrate that there is a specific threat against any of the members of those groups. There is no persuasive evidence in the record showing that Ballo, the police, or a cartel gang targeted the respondent's family unit

itself or that the family was the basis of the persecution. *Cambara-Cambara v. Lynch*, Nos. 15-1916, 15-1917, 2016 WL 4758488 (8th Cir. Sept. 13, 2016) (finding that there is evidence that aliens' family is no different from any other Guatemalan family that has experienced gang violence and there is no evidence that their mistreatment was associated with their membership in a particular social group).

Additionally, the Immigration Judge did not clearly err in finding that the respondent did not establish that his long-time residence or his imputed anti-cartel political opinion would be one central reason for any harm he would face in Mexico (I.J. at 12). While kidnappings occur in Mexico, the country conditions evidence does not establish that individuals similarly situated to the respondent are targeted for kidnapping in a systematic, pervasive, and organized manner (I.J. at 12; Exh. 6). 8 C.F.R. § 1208.16(b)(2) (the applicant must establish that the future threat to his life or freedom is on account of one of the five statutorily protected grounds); *see also Marroquin-Ochoma v. Holder, supra* (resistance to gang recruitment is not political opinion and, therefore, not a protected ground for withholding of removal); *see also Supangat v. Holder*, 735 F.3d 792, 796 (8th Cir. 2013) (finding that isolated acts of criminal conduct or lawlessness are insufficient to establish persecution).

Based on the record before us there is no clear error in the Immigration Judge's findings pertaining to the motives of the criminal gang members and drug cartels in Mexico (I.J. at 11-13; Tr. at 56-66, 125-49). 8 C.F.R. § 1003.1(d)(3)(i). The evidence of record, including the respondent's testimony, his expert's testimony, and documentary evidence does not establish that his membership in a particular social group, political opinion, or any other protected ground in the Act was or will be one central reason for his past or feared harm; rather, it was based on recruitment to fill their ranks and financial gain (I.J. at 12-14).

We also affirm the Immigration Judge's finding that "[b]ecause the respondent has not established that the harm he experienced was on account of a protected ground, he has not established that he experienced past persecution" (I.J. at 9-10).

The Immigration Judge's prediction as to the likelihood of future harm is not clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015). The respondent's encounters with Ballo and the police who questioned him about his brother, mistreated him after one inquiry, and arrested and jailed him for committing a crime all occurred more than 15 years ago, and do not establish that it is more likely than not that he would be targeted by gang members, Ballo, or the police upon return (I.J. at 2-4; Tr. at 52-66). *See Umana-Ramos v. Holder*, 724 F.3d 667, 670 (6th Cir. 2013) ("[g]eneral conditions of rampant gang violence alone are insufficient to support a claim for asylum"); *Matter of N-M-A-*, 22 I&N Dec. 312, 326 (BIA 1998) (refugee status is not proven where applicants face "a variety of dangers arising from internal strife"). The respondent's brother is a gang member who was arrested and incarcerated for committing a crime in 2013 and sentenced to more than 20 years in prison (I.J. at 2; Tr. at 66). The respondent's parents and sister remain in Mexico and have not been harmed (I.J. at 3-4; Tr. at 96-99). *See Wondmneh v. Ashcroft*, 361 F.3d 1096, 1098 (8th Cir. 2004) ("[t]he reasonableness of a fear of persecution is diminished when family members remain in the native country unharmed"); *Matter of A-E-M-*, 21 I&N Dec. 1157, 1160 (BIA 1998) (same).

Further, since the respondent did not show past persecution, he has the burden to demonstrate that internal relocation would not be reasonable. 8 C.F.R. § 1208.13(b)(3)(i). We affirm the Immigration Judge's finding that the respondent did not meet his burden of proof to demonstrate that it is unreasonable to expect him to relocate to avoid harm (I.J. at 14). 8 C.F.R. § 1208.13(b)(2)(ii) (providing that an applicant does not have a well-founded fear if the applicant could reasonably avoid persecution by relocating within the applicant's country of nationality). The respondent's problems all occurred in a local area of his hometown of Piedras Negras, Mexico. The respondent's expert witness, Dr. Boerman, testified that organized crime cartels operate unfettered throughout Mexico and that official corruption is pervasive (Tr. at 125-49). However, despite Dr. Boerman's claims regarding the reach of criminal organizations and his bleak assessment of Mexico's ability to combat organized crime, there is insufficient persuasive evidence to corroborate his claims (Exhs. 6, 7, 9). The arrest, prosecution, and incarceration of the respondent's brother show that the Mexican authorities effectively prosecute crime committed by gang members in his hometown (I.J. at 14; Resp. Br. at 20-21). See *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012); 8 C.F.R. §§ 1208.16(b)(1)(i)(B), 1208.16(b)(3)(i). For the foregoing reasons, we conclude that the respondent has failed to satisfy the standard of eligibility for withholding of removal. 8 C.F.R. § 1208.16(b).

We also affirm the Immigration Judge's denial of the respondent's application for protection under the CAT. The respondent has not established that he suffered past torture or that he would "more likely than not" be tortured by or with the consent or acquiescence of a public official, or other person acting in an official capacity in Mexico (I.J. at 15). Additionally, he did not establish that he could not relocate to avoid the harm he experienced in his hometown. See *Garcia v. Holder*, 746 F.3d 869, 874 (8th Cir. 2014) ("[W]hile the evidence may support the conclusion that the Guatemalan government is less than successful at preventing the torture of its citizens by gang members, the record does not compel the conclusion that the government is willfully blind toward it"); see also *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006); 8 C.F.R. §§ 1208.16(c), 1208.18(a).

Turing to the respondent's due process claim, he has not demonstrated prejudice and we conclude that the Immigration Judge's actions did not violate his due process rights to a full and fair hearing (Resp. Br. at 8-11). The Immigration Judge identified appropriate reasons for giving the expert witness's testimony and statements less weight (I.J. at 4; Exh. 8; Tr. at 167-72). The Immigration Judge made a finding of fact regarding Dr. Boerman's consulting business which involves providing testimony and written statements in immigration cases. The Immigration Judge found that Dr. Boerman has for the last 2 years earned his primary income from fees charged for testifying in asylum cases (200 cases) and that he has written several articles regarding gang-based asylum claims for aliens from Mexico and Central America (I.J. at 4; Exh. 8; Tr. at 167-72). The Immigration Judge's finding that Dr. Boerman has displayed bias or a lack of objectivity is a reasonable basis for giving diminished weight to his testimony and statements. The Immigration Judge did not violate the respondent's Fifth Amendment due process right to a fundamentally fair hearing in so doing, based on his factual finding regarding Dr. Boerman's primary source of income for the last 2 years. The Immigration Judge admitted Exhibit 8 along with other Exhibits on March 1, 2016 (Tr. at 18). The respondent did not object to the evidence during the hearings in March and May 2016, despite his contrary claim on appeal (Tr. at 18, 120-121; Resp. Br. at 9). Moreover, the respondent did not establish that there was a defect in the proceedings and that it caused him actual prejudice and harm and materially

affected the outcome of his case. See *Zeah v. Holder*, 744 F.3d 577, 581-82 (8th Cir. 2014) (“there is no due process violation when an IJ refuses to admit cumulative and unnecessary evidence”); *Vasha v. Gonzales*, 410 F.3d 863, 872 (6th Cir. 2005) (proof of prejudice is necessary to establish a due process violation in an immigration hearing); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.


FOR THE BOARD

TAB B



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Central American Gang Related Asylum Cases: Background, Leverage Points And The Use Of Expert Witnesses

by Thomas Boerman

Introduction

Given current case law there is a widespread belief that Central American gang related cases are essentially unwinnable. Based on conversations with seasoned immigration attorneys and my experience as a trial consultant and expert witness, however, I encourage readers to modify this perception by adding a caveat: These cases are essentially unwinnable without engaging a skilled expert who becomes familiar with the circumstances of each case and partners with attorneys to develop strategy and assist in case preparation.

Skilled trial consultants and expert witnesses are able to provide a number of essential and interrelated services. First, based on their understanding of both the socio-political context of Central America and the defining features of gang culture, experts are able to discern the important, often subtle nuances of a case; analyze the way in which those facts interact and contribute to the presenting situation; and predict the potential risk to respondents if returned to their country of origin. Through this process, experts assist attorneys to identify the most salient features of a case and to put those facts in the proper context, as well as playing an essential role in the development of case strategy.

Second, through detailed affidavits and/or testimony, experts are able to provide immigration judges and asylum officers (if invited to do so by the AO) with a comprehensive overview of the Central American socio-political context vis-à-vis gangs, a professional and nuanced interpretation of specific case facts and circumstances, and an assessment of gang mentality and culture insofar as they potentially affect individual respondents. By providing individualized affidavits and testimony, the expert paints a picture which reflects the totality of circumstances and predicts, articulates, and justifies the risks to respondents, if returned. Once accomplished, this establishes a foundation for attorneys to move forward with the presentation of key legal arguments.

Note: I have been involved in numerous cases where experts at previous stages simply provided country condition affidavits and/or testified as to the scope and nature of the gang problem within the country in question. Given the climate of the courts with respect to Central American gang related cases, this is not likely to be sufficient. In addition to discussing country conditions and the gang situation in general, it is imperative that expert affidavits and testimony also discuss the details of each individual case, place those facts and circumstances within the larger context, and describe the particular risks to respondents arising from those contextual and environmental variables.

Third, because asylum officers and immigration judges generally possess a limited and/or distorted understanding of both the Central American socio-political context and gang culture, experts fulfill an essential function by educating court officials.

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Through well written affidavits and testimony, experts substantially increase the likelihood that decision-makers will enter into deliberations with a contextual understanding of the socio-political environment respondents fled and would return to, and an appropriate conceptual framework for understanding gangs and the threat they represent given case specific facts.

Finally, experts may assist attorneys to draft examination questions and prepare respondents and other witnesses for direct and cross examination. Because of the court's position as pertains to Central American gang related cases, it is imperative that attorneys proactively defuse anticipated government arguments in a systematic manner, and experts can play an important role in developing and structuring examination questions and assisting in the preparation of witnesses in such way as to accomplish that objective.

The Scope of Central American Gang Related Cases

Thus far, the spotlight has been on young people fleeing gang recruitment and the court's unwillingness to view these youth as a particular social group is well known (although the re-opening of the Matter of S.E.G. provides a basis for cautious optimism). Despite the prevailing dim view with respect to young this population's efforts to seek relief through immigration courts there may be, depending on the nuances of the case and the totality of circumstances, opportunities to develop strategies which the courts may view in a more favorable light than the "youth fleeing gang recruitment" social group argument.

It is also important to recognize that youth fleeing gang recruitment constitute only a portion of the gang-affected Central American population seeking relief through U.S. Immigration Courts. A significant percentage of respondents were threatened or subjected to persecution by gangs because they: 1) espoused anti-gang political opinions, 2) participated in community or church-based gang prevention and intervention activities, 3) witnessed or were victims of gang crimes, 4) engaged in investigations or otherwise cooperated with law enforcement, and/or 5) are kin to someone who had fallen into disfavor with gangs. There are oftentimes potentially viable strategies in these cases, but the facts must be properly leveraged and arguments informed by attorneys' understanding of the socio-political context of Central America and the culture of gangs.

Historical Overview

Beginning in the 1980's, prior to the development of gangs as they exist in the region today, nearly a million Central American youth and their family members migrated to the U.S. to escape civil conflicts within the region.¹ Upon arrival, they found themselves out of their culture, living in poverty, and marginalized by other immigrant groups. A small percentage of these youth joined existing Hispanic gangs including 18th Street, a gang established many years prior to the wave of Central American immigration, whereas others formed gangs of their own, most notably the Mara Salvatrucha (MS13).

Partially in response to increasing levels of criminal activity, the U.S. initiated a policy of mass deportations to Central America during the 1990s.² Many of these deportees were traumatized by early exposure to war, had no ties to family or community within their countries of origin, were raised in the U.S., spoke little or no Spanish, and now had significant gang experience. These repatriations contributed to the proliferation of gangs in two ways: First, upon return many deportees were left to fend for themselves on the streets, as regional governments had no support programs in place to assist them during the transition back to their home countries; and second, U.S. policy at the time prohibited immigration officials from disclosing information about criminal deportees to receiving governments.³ As a result, seasoned gang members and youth at high risk for gang membership poured into the region by the thousands, where they lived in the shadows and under

governmental, law enforcement and social service radar screens. Needless to say this contributed mightily to the proliferation of gangs in the region.

The proliferation of gangs was also related to the fact that the region's societal and economic infrastructures had been decimated by protracted civil conflict and as wars came to an end, having nowhere else to go, many demobilized guerrillas and former military personnel turned to crime and the formation of gangs. Moreover, the region was awash in weapons and as former combatants, members of these emerging gangs were well versed in their use, desensitized to violence, and prepared to employ terror as a strategy for establishing their criminal organizations and extending their reach.

Together, MS 13 and their rivals, 18th Street, now represent the nexus of the gang phenomenon in the Central American region. It is important to recognize that while construed as a "gang problem," the phenomenon substantially more complex, as it involves the dynamic relationships between gangs, organized crime and drug cartels. This is not to suggest that all gangs are involved with these more sophisticated criminal actors, but the overlap is significant and disentangling gangs from these other crime groups has become increasingly difficult.

Current Situation

MS13 and 18th Street affiliated *clicas* (individual gangs) are ubiquitous in small, medium-sized and large urban areas in El Salvador, Honduras, and Guatemala. With regional membership estimates that range between 70,000⁴ and 300,000,⁵ gangs are commonly portrayed by government officials and the media-correctly or incorrectly-as the main contributor to the region's high rates of crime and violence and the principal threats to its socio-political stability, economic growth, and international image.⁶

Within the region, gangs currently exist in two distinct but interrelated forms:⁷ First, youth gangs that engage in robbery, extortion, street level drug dealing, and other opportunistic crime but which lack high levels of sophistication or well established linkages to other gangs or criminal organizations outside their own neighborhoods. Second, highly organized adult-directed *clicas*, which, in addition to the crimes listed above, are also active in international trafficking in narcotics, weapons, stolen vehicles, and persons. Frequently these adult-driven *clicas* are connected to organized crime, drug cartels and corrupt public officials and benefit from the organizational savvy and resources of these sophisticated criminal actors. Not surprisingly there is a fluid dynamic between youth and adult gangs, with no clear lines of demarcation between them.

Both youth and adult-driven *clicas* employ extraordinary levels of terror and violence as tools for establishing, maintaining, and expanding their positions.

Regional and U.S. Governmental Responses

Regional governments responded to the ascent of gangs with approaches known colloquially as Mano Dura (Tough, or Firm Hand).⁸ Both El Salvador and Honduras amended their penal codes to criminalize gang membership and allow for arrest and extended incarceration for "Illicit Association," independent of the conviction of other crimes. The government of Guatemala did not formally adopt Mano Dura legislation, but its strategy mirrors the law enforcement and military approaches of its neighbors. Regional governments place little or no emphasis gang prevention, rehabilitation, or social reinsertion programs and the extent to which such government support does exist the effectiveness of those programs is undermined by lack of political will, grossly inadequate funding, and widespread corruption.

As a strategy, Mano Durisma ignores empirically validated principles for responding to gang problems, has been denounced internationally because of the egregious human rights violations it spawned, and arguably intensified the gang problem

through unintended negative consequences.⁹ Mano Dura forced gangs to become more clandestine and organizationally sophisticated, created crises in each of the country's prison systems, and contributed to increased gang crime and violence. Further, because of states' failure to resolve the problem public confidence in government is virtually non-existent, resulting in both rampant vigilantism and a significant disruption of the political discourse and process. Vigilantism is visible through the resurgence of civil war era style "death squads" responsible for the extrajudicial execution of thousands of known and suspected gang members throughout the region since the mid-1990s.¹⁰ Current and former gang members I have spoken to throughout the region have stated that the Mano Dura strategy has had the effect of actually driving many deeper into gangs, despite their desire to extricate themselves from that culture.

Despite recognizing the need for a comprehensive strategy that addresses the root causes of the problem,¹¹ U.S. support to regional governments has focused primarily on law enforcement measures. These include Central American police training, development of shared law enforcement databases, inter-agency intelligence sharing, creation of an MS13 task force and FBI field office in El Salvador, and coordinated international sweeps targeting gang members in the U.S. and Central America. The U.S. has invested in prevention and rehabilitation through the U.S. Agency for International Development and a number of other organizations with which the U.S. government is affiliated (e.g., the Inter-American Development Bank, Organization of American States, United Nations, World Bank, Pan-American Health Organization, Inter-American Coalition for the Prevention of Violence) but none of these organizations is specifically tasked with or budgeted for addressing a phenomenon of this nature or magnitude. Consequently, the level of investment and expertise is inadequate in relation to the scope of the problem, and responses often fail to directly target those involved with or most at-risk for gang activity in the areas where they live and move.

Law Enforcement Response and Capacity

Despite the inclination to interpret the "get-tough" Mano Dura type approaches as reflective of a governmental commitment to confront the gang problem, the actual response has been disjointed and wildly inconsistent. At times police arrest of known and suspected gang members but due to under-resourced, inept, and corrupt investigative and judicial systems-coupled with gang members' intimidation of witnesses, police, prosecutors, and judges-prosecutions almost never occur.¹² At other times, officers avoid even entering gang-affected neighborhoods, as if waiting for rival gang members to kill each other off and/or because they are terrified of the gangs and unwilling to confront them.¹³ Many citizens and representatives from civil society have advised me that for all practical purposes there is no police presence in many gang-affected neighborhoods. Not surprisingly, gangs essentially "own" these neighborhoods and not only extort inhabitants to live, move, and operate within them but have impunity to dispense their own brand of cruel "justice" to those who fall into disfavor. I am personally familiar with numerous cases involving rape and murder that have gone uninvestigated despite the fact that victims and family members reported the identities of the perpetrators to police.

Another issue is the fact that Central America is characterized by rampant corruption among police and public officials who are invested in gangs operating with impunity. Thousands of police officers, bureaucrats, prosecutors, judges, and elected officials are in collusion with gangs¹⁴ and the resulting corruption is so rampant as to significantly undermine efforts to establish the rule of law in the region and make a mockery of government claims to be addressing the problem.

The combination of resource scarcity, ineptitude, corruption, and gangs' intimidation of police, prosecutors and judges results in a situation where governments are unwilling and/or unable to respond appropriately or effectively to the problem.¹⁵ And beyond the fact that police fail to respond or investigate when summoned by the

public, none of the affected countries have protocols in place to provide protection for witnesses or victims, so contacting police is not only futile but dangerous because it increases the likelihood of future persecution.

Gang Mentality and its Implications for Asylum Seekers

An exhaustive discussion of gang mentality is beyond the scope of this article but the concept of "respect" and responses to perceived acts of "insult" and "disrespect" are critical and warrant review.¹⁶ To be "respected" is synonymous with being feared, which is based on one's propensity for violence, bravado, audacity, and do-or-die commitment to the gang and the lifestyle. Being "respected, in turn, serves as the basis for an individual's "reputation." The need for "respect" and "reputation" represent a compelling force in gang members' lives and they go to great lengths to establish and preserve both with members of the own gang, rivals, and the public. These same principles apply to gangs as a whole in that entire gangs are driven by the need for "respect" and "reputation."

This is of direct relevance to attorneys and advocates because the implications of gang mentality underlie many Central Americans' decision to flee their home countries. Rebuffing recruitment efforts, refusing to pay extortion demands or provide material support, espousing anti-gang political sentiments, participating in community-based gang prevention and intervention activities, reporting gang activity to police, pursuing prosecution, or fleeing to avoid gangs are acts that gang members perceive as challenges; "insults" and acts of "disrespect" which demand a violent and punitive response. Feeling powerless to end the cycle of persecution, many who have been targeted by gangs see migration to the U.S. as their only viable alternative.

There are several key factors to highlight with respect to gang mentality and applicants' risk of future persecution. First, once an individual or family has been targeted for retribution, the gravity of the threat does not diminish with time; even over the course of years. Second, because fleeing to the U.S. to avoid a gang is itself interpreted as an "insult" and an act of "disrespect," the risk to respondents who are returned is likely to be greater than it was at the time they left their country. Third, the threat to individuals who have been targeted routinely generalizes to other members of that person's family, both those who remain in their country as well as those who flee and are later forced to return. Each of these points relate directly to the risk of future persecution to respondents, and can be leveraged by attorneys in developing case strategy and when presenting arguments.

Gangs' Political Objectives and Strategies

Gangs and other criminal organizations throughout Central America seek to establish a socio-political climate favorable to their criminal enterprises by influencing the political process. During decades of civil conflict in Central America politically motivated atrocities were routinely committed in order to terrorize political opponents and the public into submission. As a direct descendant of that strategy, gangs and the organized crime groups and drug cartels they are frequently associated with now blend criminality with tactics generally associated with terrorism and warfare.¹⁷ The strategic use of random violence, kidnapping, torture and murder are employed as part of a coordinated effort to terrorize and co-opt police, bureaucrats, prosecutors, judges and elected officials in order to shape a socio-political environment within which they are free to operate with impunity. These actions are intended to demonstrate gangs' and other crime groups' audacity, power, and capacity to render states impotent to effectively limit or control them.

Analysts from the U.S. military characterize Central American gangs and organized crime groups as non-state actors engaged in efforts to establish political control and domination through "asymmetrical warfare."¹⁸ These analysts correctly point out that crime groups' motives differ from those of traditional insurgents but their objective is

the same: to impose their power and undermine the operational capacity and authority of legitimate state actors. In areas of Central America gangs now act as de facto governments; not because they perform civic functions as did some guerilla organizations during the region's civil wars, but because they have undermined states' capacity to fulfill basic functions of governance to the point of making legitimate institutions largely irrelevant. Within this void, gangs and other criminal organizations operate with near impunity, and anyone who interferes with or opposes their efforts to establish political control is subject to acts of intimidation, terror and brutality. Significantly, many actions taken by respondents which resulted in their being targeted by gangs (and the subsequent decision to flee to the U.S.) have been viewed by the courts as expressions of political opinion, or a response to imputed political opinion.

Internal Relocation as a Strategy for Return

For at least three reasons, government assertions that respondents in these cases can be returned and relocated internally may be unrealistic. First, throughout Central America there exists an informal but extraordinarily efficient communication network which ensures that the arrival of deportees from the U.S. is known soon after, and in many cases before, returning to their home country. This informal "grapevine" represents a direct risk to deportees, as it renders implausible the possibility that they can return without gang members being aware of their presence, thereby setting up a scenario where they are likely to again be targeted.

Second, gangs have their own networks and communication structures in place which, practically speaking may make it impossible for someone to effectively hide upon return. This is particularly true if respondents' circumstances would necessitate a return to the area where past persecution occurred, or where they had family who had been identified by the pursuing gang(s). The region is characterized by countries which range in size from roughly that of Massachusetts in the case of El Salvador, to West Virginia in the cases of Guatemala and Honduras. Within these relatively small geographical areas are tens of thousands of gang members who are networked in across the region and who have access to the sophisticated communication technologies. I know of numerous cases where respondents have relocated to other areas of their countries as many as three and four times, and in each case they have been located by the gangs and the threats renewed.

Finally, while there are rural areas in the region where gangs do not have a strong presence, those areas are characterized by subsistence agriculture and levels of grinding poverty that are so extreme that even those with multi-generational ties to the agrarian lifestyle are forced to migrate to urban areas in search of employment. Given these economic realities, it would be utterly untenable for deportees with no ties to subsistence agricultural communities or the land to relocate to the countryside and survive.

Key Points to Remember When Developing Case Strategies

The discussion in the above sections provides guidance on ways in which case specific facts may be leveraged in the development of case strategy. Key points to remember:

- Within the context of gang culture, anyone who refuses to comply with gangs' demands or thwarts their objectives has committed an act of "insult" and "disrespect" which necessitates a punitive response. Threats do not diminish over time and risks to an individual who has been targeted, frequently generalize to their family, which may provide the foundation for "family as social group" arguments.
- Gangs and their criminal counterparts have political agendas aimed at establishing a socio-political climate within which they are free to act with impunity and individuals or organizations that challenge their efforts to establish this environment are responded to with intimidation and brutality.

The actions of respondents which resulted in their being targeted for persecution may potentially be framed within the context of political opinion, either expressed or imputed.

- Regional governments' responses to the gang phenomenon have failed due to the sheer scope of the problem coupled with counterproductive policy, resource scarcity, lack of professional competence, and rampant corruption. Domestic and international law enforcement measures implemented thus far have not translated to increased security for the public and by nearly all accounts the police and governments are unable and/or unwilling to protect citizens at risk from gangs or other crime groups.

Conclusion

It is well known that the courts are disinclined to take a favorable view of cases involving respondents fleeing Central America in response to gang violence. Asylum officers and immigration judges are not well versed in their understanding of the gang phenomenon or the socio-political context within which it exists, and the prevailing view is that these cases are essentially unwinnable. With assistance of an expert who possesses a comprehensive view of the gang phenomenon and who is willing to actively partner with attorneys, however, openings do exist through which respondents who have fled nearly incomprehensible levels of violence may in fact find relief through the courts and avoid being returned to circumstances which carry with them extraordinarily high risk of persecution.

End Notes

¹For a comprehensive discussion of the Central American gang phenomenon see:

Central American Gangs: An Overview of the Phenomenon in Latin America and the U.S., Journal of Gang Research, 15(1), pp. 35-52. Thomas Boerman, 2007.

Central America and Mexico Gang Assessment. U. S. Agency for International Development, 2006.

Central American Gang Related Asylum: A Resource Guide. Washington Office on Latin America, 2008.

No Place to Hide: Gang, State, and Clandestine Violence in El Salvador. Harvard Law School. 2006.

²*No Place to Hide: Gang, State, and Clandestine Violence in El Salvador*. Harvard Law School. 2006.

Central America and Mexico Gang Assessment. U. S. Agency for International Development, 2006.

³*Central American gangs: An Overview of the Phenomenon in Latin America and the U.S.* Journal of Gang Research, 15(1), pp. 35-52. Boerman, T. 2007.

Central America and Mexico Gang Assessment. U. S. Agency for International Development, 2006.

This situation has not changed substantially since high numbers of repatriations began in the 1990s. Regional governments still do not have comprehensive re-entry services available to either administrative or criminal deportees, and while U.S. law now authorizes disclosure of information on criminal deportees, numerous Central American governmental and non-governmental representatives I have interviewed have advised that practices for information sharing are still not standardized and law enforcement officials still rely heavily on their own assessment of deportees' gang status at the time of re-entry. This sets the stage for significant problems with both

over and under-identification of gang members, i.e., erroneously identifying deportees as gang affiliated when they are not, and failing to appropriately identify bona fide gang members due to lack of recognition skills.

⁴*Gangs in Central America*. Congressional Research Service, Number RS22141. Ribando, C. (2005, May 10).

⁵*North American transnational youth gangs: Breaking the chain of violence*. The Heritage Foundation Backgrounder, Number 1834. Johnson, S., & Muhlausen, D.B. March 21, 2005.

⁶*While gangs' influence is clearly destructive and the violence they perpetuate horrific, understanding of their actual contribution to the region's extraordinarily high rates of crime and violence is based largely on speculation, as no empirical analysis has been conducted and little effort has thus far been made to disentangle gangs' contribution to the problem from that of other sources of crime.*

⁷Central American gangs: An Overview of the Phenomenon in Latin America and the U.S. *Journal of Gang Research*, 15(1), pp. 35-52. Boerman, T. 2007.

Gangs and Transnational Criminals Threaten Central American Stability. Lt. Col. Howard L. Gray. 2009. U.S. Army War College, Strategy Research Project. <http://www.stormingmedia.us/63/6318/A631894.html>

No Place to Hide: Gang, State, and Clandestine Violence in El Salvador. Harvard Law School. 2006

⁸*Central America and Mexico Gang Assessment*. U. S. Agency for International Development, 2006.

ICJ Attacks on Justice - Honduras, 2005 <http://www.icj.org/IMG/HONDURAS.pdf>

⁹*Central American gangs: An Overview of the Phenomenon in Latin America and the U.S.* *Journal of Gang Research*, 15(1), pp. 35-52. Boerman, T. 2007.

Gangs and Transnational Criminals Threaten Central American Stability. Lt. Col. Howard L. Gray. 2009. U.S. Army War College, Strategy Research Project. <http://www.stormingmedia.us/63/6318/A631894.html>

No Place to Hide: Gang, State, and Clandestine Violence in El Salvador. Harvard Law School. 2006.

¹⁰*The extrajudicial execution of known and suspected gang members has been well documented by governmental and non-governmental human rights groups, national ombudsman, the U.S. State Department, the United Nations, the international media, international development and donor agencies, gang intervention specialists, and the church. No precise figures are available as these executions are conducted by clandestine groups, many with known or suspected official connections. Killings are routinely conducted in a manner reminiscent of the civil war era, when political opponents were abducted, tortured, murdered, and their bodies either left at the scene or dumped in public places as a means of conveying a message through terror.*

¹¹*Gangs and crime in Latin America*. U.S. Subcommittee on the Western Hemisphere, Committee on International Relations, U.S. House of Representatives (2005, April 20). Serial number 109-96.

¹²*Marked for Death: The Maras of Central American and Those Who Flee Their Wrath*. *Georgetown Immigration Law Journal*, 20(407). Jeffrey D. Corsetti. 2006.

¹³*Ibid.*

No Place to Hide: Gang, State, and Clandestine Violence in El Salvador. Harvard Law School. 2006

¹⁴*Marked for Death: The Maras of Central American and Those Who Flee Their Wrath.* Georgetown Immigration Law Journal, 20(407). Jeffrey D. Corsetti. 2006.

¹⁵*Ibid.*

¹⁶The term *Gang Mentality* is commonly used to describe gang members' way of thinking, interpreting events, and responding to situations. The mentality can be broken down into components but in actuality each component feeds into, and is reinforced, by the others and becomes the foundation for gang culture. Gang mentality consists of the following components: 1) respect, 2) disrespect for rivals, 3) no insult goes unanswered, 4) consequences as a rite of passage, 5) problems handled within the gang, and 6) disregard for the rights of non-members.

¹⁷*Gangs and Transnational Criminals Threaten Central American Stability.* Lt. Col. Howard L. Gray. U.S. Army War College, Strategy Research Project. 2009. <http://www.stormingmedia.us/63/6318/A631894.html> *Street Gangs: The New Urban Insurgency.* Max G. Manwaring. Strategic Studies Institute, 2005.

¹⁸*Ibid.*

About The Author

Thomas Boerman, Ph. D. Dr. Boerman's areas of professional focus include the personal and environmental factors that underlie the initiation, maintenance, and cessation of gang activity; and the development of school, community and institution-based gang prevention, rehabilitation, and social reinsertion programs in the U.S and Latin America. He has a B.A. in International Studies with a focus on Latin America, and has been involved in human rights issues in the region since 1985. Since 2004 he has served as a consultant to numerous international development and donor organizations active in addressing the gang phenomenon in El Salvador, Honduras, Guatemala, Mexico and Panama, and has worked as a trial consultant and expert witness in approximately 45 Central American gang related asylum cases since 2007.

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TAB C

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The Central American
Gang Phenomenon

to
REFUGEE

Beginning in the 1980s, nearly one million Central Americans migrated to the United States to escape civil conflicts within the region. Upon arrival, they found themselves out of their culture, marginalized by other immigrant groups, and living in poverty. As a result, a small percentage of the young immigrants either joined existing gangs or formed gangs of their own.¹

by THOMAS BOERMAN, PH.D.

from
PERSECUTION
to **REFUGE**

THE CENTRAL AMERICAN "GANG PHENOMENON"

In the 1990s, the U.S. government enacted the Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), and the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), which led to the return of thousands of refugees to Central America.² Many had been raised in the United States, spoke limited Spanish, had been traumatized by war, lacked family or community ties within their home country, and had varying degrees of gang experience. Upon return, some deportees joined with demobilized guerrillas and former military personnel, who had turned to crime in the aftermath of civil wars, to form the nexus of the gang and organized crime phenomenon that now plagues the region.

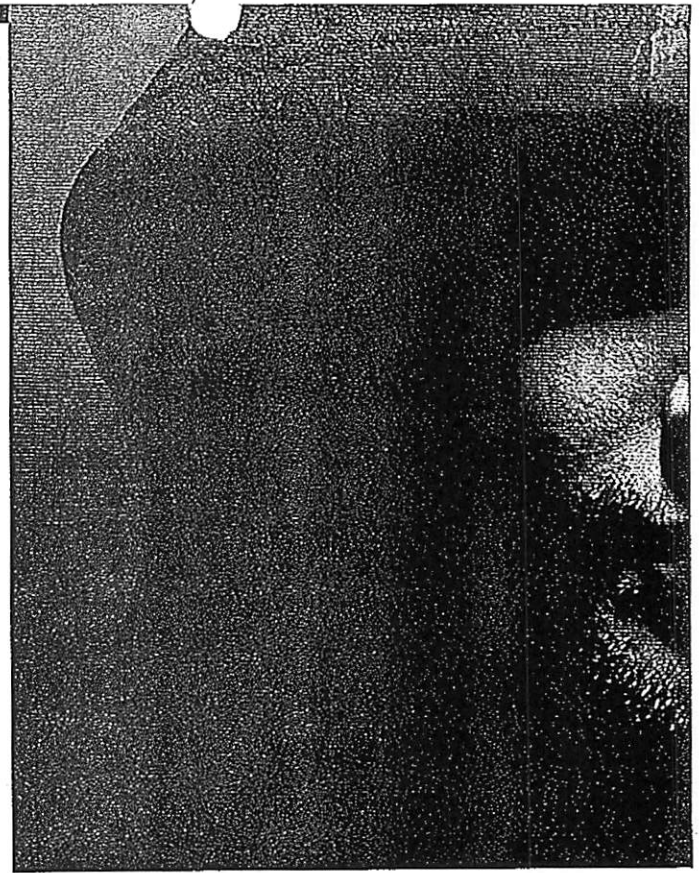
The Current State

Gangs in El Salvador, Honduras, Guatemala, and in some areas of Mexico are involved in criminality that ranges from opportunistic to highly sophisticated, and engage in incomprehensible levels of brutality toward rival gangs, police, government officials, and the public. Although construed as a “gang problem,” the phenomenon is substantially more complex and involves the dynamic relationships between gangs, organized crime, and drug trafficking organizations. Certainly not all gangs are involved with these more sophisticated actors, but the co-mingling is significant. Disentangling gangs from other criminal groups has become increasingly difficult.

Regional governments responded to the ascent of gangs by enacting laws and tactics known as *Mano Dura* (tough or firm hand). However, these have been largely ineffective at eradicating the problem.³

Gangs: “Domestic Terrorists”

Central American gangs and organized criminal groups have undermined states’ capacity to fulfill basic functions of governance to the point of making legitimate institutions largely irrelevant. It is commonly recognized that they now exercise effective control over much of Guatemala and the Central American region,⁴ subjecting those who oppose their efforts to acts of intimidation and brutality. For state officials or members of the public who refuse to succumb to gangs’ demands or attempt to hold them legally accountable, it is



often an expression of their political opposition to gangs—an effort to reclaim their communities and countries from criminal groups that are attempting a virtual takeover.

A legal attaché to the U.S. Embassy in El Salvador compared gangs to “domestic terrorists,” stating that their objective is to destabilize society⁵ by imposing their power and undermining that of the state. Because regional governments’ capacities and legitimacy were marginal to begin with, criminal groups have been able to advance their objectives with relative ease.

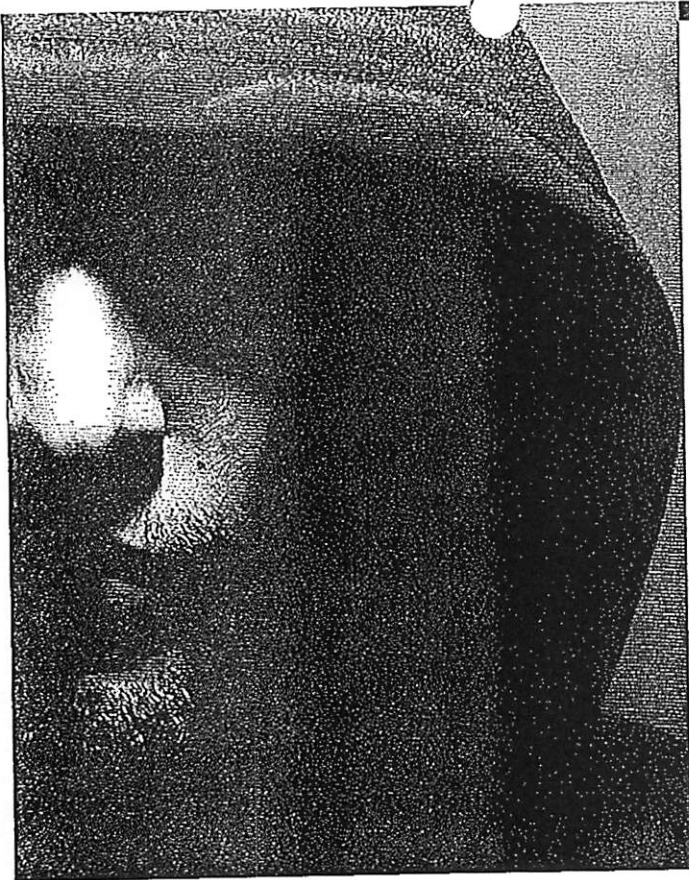
Gang Mentality and Asylum-Seekers

In the context of gang-related claims, it is crucial to understand the gang mentality and the concept of “respect.” For gang members, being “respected” is tantamount to being feared. To reject their recruitment efforts, refuse to pay extortion, refuse



Get ALLA's seminar recordings "[Gang-Based Asylum Applications](#)" (Sept. 16, 2010) and "[Particular Social Group Analysis in the Brave New Post-S-E-G-World](#)" (March 15, 2011) for more guidance.

PREVIOUS PAGE ABOVE: SHUTTERSTOCK



to participate in anti-gang activities, or even flee to avoid gang persecution are perceived to be acts of "disrespect." The resulting response is generally violent and retaliatory. It is this element of gang mentality that underlies persecution and drives migration to the United States as the only perceived alternative to escalating levels of risk and brutality.

There are several other factors that relate directly to asylum applicants. First, once an individual (or family) has been targeted, the threat does not tend to diminish with time, even over the course of years. Second, threats to individuals routinely generalize to members of their family, the family as a whole, or a subset of the family. Third, gang members interpret attempts to avoid them or their demands as challenges or acts of antagonism, so petitioners who flee to the United States, and are then subsequently removed from the United States, may be at greater risk upon return than they were prior to their departure.

Developing Case Strategy

Experienced attorneys agree that *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), has been commonly misinterpreted, and frequently misapplied. The ruling grew out of a case involving forced gang recruitment

in El Salvador and has been generally—and erroneously—construed as applicable in essentially *any* recruitment-based claim, irrespective of case facts. Moreover, some government attorneys and judges have applied *S-E-G-* to virtually *all* Central American claims, even those that do not involve forced recruitment. As such, attorneys and experts must address the ways in which the ruling has been misinterpreted, and differentiate individual cases from *S-E-G-* (Note: *Matter of S-E-G-* has been reopened and there is cause for cautious optimism, but the ruling still has precedential value).

In terms of strategy, attorneys should first determine whether there is a basis for a non-gang-based claim. For example, intimate-partner violence or child abuse claims may include gang components where it may be preferable to base primary arguments on those elements and argue the gang dimension as a secondary risk factor.

Attorneys and experts must address the ways in which the ruling has been misinterpreted, and differentiate individual cases from *S-E-G-*.

If there is no alternative to a gang-based claim, work with experts to ascertain whether there are alternatives to particular social group (PSG) arguments. For instance, case facts often support political opinion arguments, both imputed and expressed. Examples include petitioners who were persecuted, or would be at risk of persecution, because they: (1) reported gang crime to police or cooperated with investigations; (2) made public anti-gang political statements; (3) participated in law enforcement, military community, or church-based anti-gang efforts; and/or (4) refused to succumb to extortion or other demands based on anti-gang political opinions. Some judges have even chosen to view resisting forced gang recruitment as an expression of political opinion versus viewing it through the lens of *S-E-G-*. The key is that the petitioner must hold an anti-gang political opinion and the facts must establish that the persecution was, or would be, on account of that opinion. →

Attorneys also may argue religiously-based persecution. These claims typically involve youth who were threatened or recruited due to their involvement in the church and/or religious schools, or adults who were persecuted, or are at risk of persecution, because of their religiously-based outreach efforts and/or anti-gang moral position.⁶ The church is an outspoken critic of gangs, so successfully recruiting religious youth and "punishing" clergy and laity have both symbolic and strategic value. Attorneys and experts must establish that gangs would reasonably have known that the petitioner was actively religious, and that he or she was targeted on account of his or her religion or religious expression. The courts have acknowledged the relationship between moral and political opinion. Therefore, attorneys and experts may need to assess whether to argue religiously-based claims, political opinion, or a combination of both.

If no PSG alternative exists, explore groups that address judges' concerns about social visibility, recognizability and particularity, e.g., "family as social group," "economically marginalized youth from homes with no adult male presence," or "economically marginalized females with no male dominated family or social network." Each of these groups has parameters around it, and experts can be used to clarify to the court that members are recognized within their communities and targeted by gangs for reasons that relate directly to their membership in that group.

Given the challenges associated with Central American gang-based claims, attorneys are strongly encouraged to enlist the services of experts who are willing to actively partner at multiple stages of the process."

Use of Expert Witnesses

The dearth of research and citable resources, coupled with the unfavorable climate of the courts, makes it essential for attorneys to engage experts. Experts can play an important role by interviewing petitioners to establish the credibility of the claim, assisting attorneys to develop case strategy, participating in the development of direct examination questions, and by drafting individualized affidavits that: (1) place case facts within the Central American socio-political context

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of vis-à-vis gangs; (2) explain past persecution based on a comprehensive understanding of gang culture and mentality; and (3) predict the risk to petitioners, if returned. And since expert affidavits alone are not likely to be sufficient, attorneys should seek out experts experienced in providing testimony.

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experts who are willing to actively partner at multiple stages of the process. ▽

Conclusion

It is well known that courts take a dim view of Central American gang-based asylum claims, making it imperative that strategies differentiate case facts from *Matter of S-E-G* and reflect an understanding of both the socio-political context of Central America, and the culture and mentality of gangs. Individual case facts must then be placed within this larger context and leveraged to predict risk to petitioners, if returned, in a manner that fits within the framework of U.S. asylum law. Given the challenges associated with Central American gang-based claims, attorneys are strongly encouraged to enlist the services of

Dr. Thomas Boerman has worked as a trial consultant and expert witness in approximately 100 Central American gang-related asylum cases and has been involved in Central American human rights issues since 1985.

1 For a more comprehensive discussion of the Central American gang phenomenon, see generally T. Boerman, *Central American Gangs: An Overview of the Phenomenon in Latin America and the U.S.*, 15(1) *J. of Gang Research* 35-52 (2007); J.D. Corsetti, Note, *Marked for Death: The Moras of Central America and Those Who Flee Their Wrath*, 20 *Geo. Immigr. L.J.* 407 (2006).

2 See Clare Ribando Seelke, Cong. Research Serv., "Gangs in Central America," RS22141 (2009).

3 See R Funes, Note, *Removal of Central American Gang Members: How Immigration Laws Fail To Reflect Global Reality*, 63 *U. Miami L. Rev.* 301-338 (2009); Washington Office on Latin America, *Central American Gang Related Asylum: A Resource Guide* (May 2008); U.S. Agency for Int'l Dev., *Central America and Mexico Gang Assessment* (2006); Pedraza Fariña, Miller, & Cavallaro, *No Place to Hide: Gang, State, and Clan Violence in El Salvador*, International Human Rights Clinic, Harvard Law School (2010).

4 See Dr. H. Brands, *Crime, Violence, and the Crisis in Guatemala: A Case Study in the Erosion of the State* (2010).

5 See "Gangs Akin to Terrorist, FBI Agent Says" *LA Times*, April 23, 2010.

6 In an unpublished opinion, on June 19, 2009, an immigration judge granted a case to a Salvadoran man who claimed past persecution on account of a particular social group. The group was defined as "people with a shared past experience of religious leaders in El Salvador who refused to participate in the illegal drug trade."



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Central America Updates: Gang and Organized Crime-Based Immigration Claims and the Growing Importance of Expert Witnesses

by Thomas Boerman

While in a certain sense the socio-political context of El Salvador, Honduras and Guatemala remain largely unchanged in recent years, in other respects the situation has evolved substantially and in ways that require an updated understanding on the part of Asylum Officers, attorneys and Immigration judges. In general, country conditions have deteriorated significantly in the Northern Triangle countries despite increasing infusions of aid from U.S. and other international donors, technical assistance, and fledgling efforts to establish a regional approach to crime and violence. The following sections provide a brief overview of relevant changes in each of the countries:

El Salvador. The most significant update from El Salvador is the much-ballyhooed "Gang Truce." In March 2012, the Mara Salvatrucha (MS13) and the Mara 18 agreed to a truce intended to reduce inter-gang violence. In exchange for directing lower level gang members to reduce the killings, incarcerated gang leaders were granted concessions. Most notably those involved transfers from harsh maximum-security prisons to more comfortable lower security facilities and increased privileges.^[1] These privileges include conjugal visits, cell phone access and opportunities to communicate directly with other gang leaders and members on the street.

For six months after its implementation the Salvadoran government denied any involvement in the truce or its negotiations, reporting that a former congressman and a representative from the Catholic Church facilitated the process. It was later revealed publicly, however, that high-ranking government security officials, including the president, were directly involved in the process from the beginning.

Initial reports indicated that the homicide rate had dropped by 60 percent following implementation of the truce, although the actual end-of-year statistics demonstrate that the decline was just over 40 percent.^[2] Determining the actual reduction is difficult however, because while reported homicides have decreased since implementation of the truce the number of disappearances has grown substantially, leading analysts to conclude that gangs are simply burying their dead as opposed to leaving the bodies in the street.^[3] An MS13 gang member interviewed during research into the truce was quoted as saying, "What truce? We have orders not to leave bodies, but the killings continue."^[4]

It is also critical to point out that since the truce was intended to reduce *inter-gang violence* (i.e., between MS13 and 18th St.) it does not necessarily apply to the general public nor does it affect gang criminality. Security Minister David Munguía Payes states that despite the truce gangs continue to engage in violence and have been responsible for half the country's murders since its implementation.^[5] The PNC reports that gangs have developed more sophisticated extortion practices, and that rates of extortion have increased significantly since the truce was implemented.^[6] According to a gang expert in the Salvadoran *Fiscalía* (Attorney General's Office), "[t]he truce is a sham. It's a lie, the gangs continue to operate, people continue getting killed, people keep disappearing and the gangs get stronger and stronger."^[7] In a statement issued by the Catholic Conference of Bishops, the church hierarchy lamented the fact that the truce has not led to a reduction in extortions, robberies or rapes and has not translated to a benefit to the public.^[8]

As opposed to a long-term reduction of crime and violence, it is more realistic to conclude that the truce reflects gangs' strategies to maintain their criminal enterprises while leveraging the government in order to gain greater degrees of political power.^[9]

Evidence of gangs' intention to leverage the truce and the government to gain increased political power has become increasingly evident. On July 12, 2012, high-ranking members of the Organization of American States (OAS)-including the head of the OAS, General Secretary José Miguel Insulza met with incarcerated MS13 and 18th St. leaders so the gangs could present demands for what they refer to as the "Second Phase" of negotiations with the Salvadoran government. Their demands included: 1) a cessation of police anti-gang operations in areas under MS13 and 18th St. control; 2) a withdrawal of military troops a deployed to combat gangs, and 3) repeal of El Salvador's current anti-gang legislation, *la Ley de Proscripción de Maras, Pandillas, Agrupaciones, Asociaciones y Organizaciones de Naturaleza Criminal* (Law Prohibiting Gangs, Groups, Associations, and Organizations of a Criminal Nature) a.k.a. *the Proscripción de Pandillas*.^[10]

The fact that gang leaders would be granted an audience with the OAS reflects not only gangs' political aspirations, but also the degree to which they now wield power in El Salvador, and how in critical respects may hold the Salvadoran government hostage. In August 2012, the Salvadoran Security Minister announced that the government would be scaling back police operations against gangs, a complete reversal of the position he articulated prior to gang leaders' meeting with the OAS.^[11]

Analysts are concerned that as opposed to the truce increasing the Salvadoran government's power over gangs, it has increased gangs' power over the state.^[12] Reductions in the homicide rate, whatever they may be in actuality, have not been achieved through actions of the Salvadoran government but because it was perceived as advantageous to gang leaders. Not surprisingly, there is significant concern that if the process does not proceed in a manner gang leaders see as advantageous they will simply abandon truce and the murder rate will increase to previous levels. In the words of one member, "If we want something, we threaten to put bodies on the street. Then we get what we want."^[13] Stated differently, it is realistic to conclude that gang leaders now have the Salvadoran government in a disadvantaged position and may be able to wring concessions from the state by threatening to rescind the truce and instantly drive rates of violence to previous levels, or higher.

Based on assessment of currently available information, I concur with other experts that although the truce represents a potential opening that must be fully leveraged, one must take a position of very guarded optimism. It is far too early to ascertain the actual reductions in violence associated with the truce, to conclude that those reductions will be sustainable over time, or to assess what if any improvements occur in terms of public security. Further, the implications in terms of the political dynamic between gangs and the Salvadoran government have yet to be ascertained with certainty, but initial assessments suggest that gangs may have gained power at a cost to the state.

Honduras. The 2009 coup d'état that ousted President Manuel Zelaya was a boon for gangs and other organized crime groups. President Zelaya had paid little attention to the problem of crime and violence, but the interim government of Roberto Micheletti was focused on suppressing internal political dissent and it ignored entirely, resulting in significant openings for organized criminal groups to deepen their hold on the country.^[14] Consequently, as bad as things were before the coup, by the time Porfirio Lobo Sosa was inaugurated as the post-coup president in January 2010, the situation had deteriorated even further and remains in a downward spiral.

One of the most significant changes of late relates to the increased flow of narcotics through the country. Honduras has served as a transit point for drugs moving from South America to North America since the 1970s, but recently the problem has worsened significantly. According to the U.S. State Department, nearly 80 percent of cocaine smuggling flights from South to North America now pass through Honduras.^[15] With this has come a substantial increase in violence, and official corruption. The Honduran Attorney General recently stated publicly that the country has no structure for investigating crimes and that only 20 percent of homicides are investigated.^[16] This is particularly significant in that Honduras, a country roughly the size of Virginia, recorded 7,102 murders in 2012, almost 20 per day or 85.2 per 100,000, the highest in the world.^[17] Putting this figure in context, the U.S. homicide rate is roughly 6 per 100,000, and Canada's is less than 2 per 100,000.

Not surprisingly, within this context of impunity gangs have become increasingly emboldened. In one particularly outrageous example gang members actually imposed a curfew in areas of the capital, Tegucigalpa, forcing businesses, churches and public transport to shut down by 7:00 p.m.^[18] Fear, frustration and anger over such brazen acts continues to manifest in the extrajudicial killing of known and suspected gang members; an average of three young people per day are murdered extrajudicially in Honduras, bodies often cut into pieces and left in garbage bags on the streets. According to one of Honduras' most recognized human rights defenders, of those few extrajudicial executions that are investigated police are believed to be involved in 30 percent of the cases.^[19] In 2013 Honduran officials released a report citing police involvement in 149 homicides during the previous 23 months.^[20]

The Honduran government now freely acknowledges that in addition to the police, organized criminal groups have infiltrated the judiciary and military and gained substantial control over ten of the country's eighteen departments (states); home to seventy-five percent of the Honduran population.^[21] According to a 2011 disclosure by the Vice-President of the Honduran National Congress, 40 percent of the country's police officers and ten percent of its legislators are directly linked to organized crime.^[22]

During a 2012 visit to Honduras, I met with the director of National Police, Juan Carlos "El Tigre" (The Tiger) Bonilla, who was appointed in May 2012 because of his strong anti-corruption position. It is important to note that in addition to his anti-corruption stance, while serving as a regional police commander Bonilla was accused of extrajudicial execution, including the killing of minors. After being implicated in three counts of extrajudicial murder and involvement in 11 other deaths and disappearances he went into hiding, later turning himself into authorities. He was tried and acquitted in 2004 but when questioned about his role in the killings Bonilla responded to prosecutors by saying, "There are things that one takes to the grave. What I can tell you is that I love my country, and I am ready to defend it at all costs, and I have done things to defend it. That is all that I will say."^[23] His statement was generally considered to be an admission of guilt but because vigilantism and extrajudicial execution are considered legitimate responses to crime and violence, his likely involvement was largely forgotten. Bonilla was sacked in April 2011 and it is rumored that he intends to flee Honduras.

Recent attempts to root out corruption have thus far not produced any meaningful results. Since President Lobo Sosa took office in January 2010, not one state official has been brought to justice, nor has the *Plan de Transparencia y Lucha Contra la Corrupción* (Plan of Transparency and Fight against Corruption), passed in 2011, had any discernible effect.^[24] Efforts to clean up the National Police have not been effective, either. When Director Bonilla announced the firing of 100 police officers over corruption charges in October 2012, officers sought to remove him from his position through judicial action and threatened a take over of police headquarters if the judicial approach was not successful.^[25] At this point, 230 officers of all ranks including department heads that failed vetting process remain in their positions, and the head of Honduras' Independent Commission on Public Security Reform has called the National Police "unreformable."^[26]

Guatemala. The combined effects of crime, violence and official corruption have brought Guatemala to the brink of being a "failed state." In 2009 analysts from the Brookings Institute referred to the country as "Guatemalastan," a clear comparison between Guatemala and Afghanistan.^[27] Unfortunately, while there have been a few notable successes, overall the situation has deteriorated since that time. The public's anger and frustration over the inability and unwillingness of post-war non-authoritarian governments' failure to rein in crime and violence manifested in the election of retired war-era general President Otto Pérez Molina, who promoted, and has now implemented, a military-driven *Mano Dura* (tough hand) approach since being inaugurated in January 2012. In a land characterized by atrocious human rights abuses committed by military and pro-

government forces, ...s reflects the depth of the public's clamoring for security, ...en if it involves a return to "the good old bad days."

Of the various noxious factors contributing to the deterioration in Guatemala, one of the most significant relates to the continued incursion of transnational drug trafficking organizations, namely Los Zetas and the Sinaloa Cartel from Mexico. The Zetas influence is so pervasive that in a highly publicized and radical step, then-President Alvaro Colom imposed a state of siege in the province of Alta Verapaz in 2010 because the Zetas had made the region ungovernable. The siege managed to flush out members of the Zetas and send them packing temporarily but they returned once the siege ended, set up shop again and have since become even more entrenched than before. In a well-publicized and particularly hideous display of their barbarism and audacity, the Zetas massacred 30 people, including 27 innocent farm laborers, after their cattle ranching boss stole a drug shipment from Los Zetas. Most of the victims were dismembered.

The extent of police corruption also continues to grow. As examples, twelve anti-narcotics officers were arrested in March 2013 after swapping out 25 kilos of cocaine worth over three million dollars with bicarbonate of soda.^[28] In September 2012, authorities arrested 19 other officers over their involvement in extortion, kidnapping, robbery, car***** and money laundering.^[29] The list of examples such as these is virtually without end. The situation has become extreme that officials have considered "microchipping" police officers to track their movements due to on-duty involvement in criminal activities.^[30]

Corruption has also grown in the courts. A recent report identified and exposed 18 judges over rulings favorable to organized crime and corrupt officials.^[31] According to the report, some of those named were already under investigation or on trial, including one that was running an illegal adoption ring and another that thwarted efforts to prosecute former Guatemalan President Alfonso Portillo, who embezzled millions and was sought by the U.S. government.

President Molina has authorized an extension of the U.N. *Comisión Internacional contra la Impunidad en Guatemala*- CICIG (International Commission against Impunity in Guatemala), which was established in 2007 to: 1) dismantle the *Cuerpos Legales y Aparatos Clandestinos de Seguridad* (Illegal Corps and Clandestine Security Apparatus), a well known group that facilitates much of the country's organized crime activities; 2) investigate government officials' involvement in organized criminal activity; 3) assist the *Ministerio Público* (Attorney General's office) to prosecute cases; and 4) enact reforms to address the problem.^[32] Predictably, the commission's attempts to implement reforms have been largely stonewalled and its first director resigned in 2010 because of the government's refusal and inability to act upon the commission's recommendations. The current director states forcefully that efforts are being made at every turn to reverse the CICIG's successes. Guatemala is the only country in the world that has a U.N. mission of this type.

Continued Importance of Expert Witnesses

Identifying and assessing the inter-related factors that account for past threats or harms and/or making predictions of future risk to respondents if returned typically requires years of dedicated study, research and direct involvement in the gang and organized crime issue. Further, maintaining a current understanding of country conditions and the ever-shifting criminal landscape in Central America necessitates day-to-day involvement with the problem and its many dimensions. As such, it is generally unrealistic to expect that immigration professionals would have had the opportunity to gain the level of expertise necessary to conduct comprehensive analyses of particular case facts, or to remain abreast of the continually evolving situation on the ground in Central America. The Executive Office for Immigration Review seems to support this position:

"Immigration Judges, like other trial judges generally, are often required to determine factual disputes regarding matters on which they possess little or no knowledge or substantive expertise, and, in making such determinations, they typically rely on evidence, including expert testimony, presented by the parties."^[33]

The article goes on to say:

Because of their specialized knowledge, "[e]xpert witnesses are often uniquely qualified in guiding the trier of fact through a complicated morass of obscure terms and concepts," and they can provide conclusions and inferences drawn from facts that lay persons are not qualified to make.

Within this specialized and complex field, gang and organized crime experts fulfill a number of critical functions, one of the most important of which is to assist all parties-Asylum Officers, Immigration and government attorneys and judges-to view the facts of any given case through the lens of gang culture and mentality and with an understanding of the socio-political of the given country. Stated differently, experts may play a critical role in assisting immigration professionals to *contextualize* the facts of any given case, thereby assisting decision makers in determining if, when and how those facts fit within the framework of the law.

As in any case in which expert witnesses are called upon, to the greatest extent possible Central American gang and organized crime specialists should base their opinions on credible, objective and verifiable sources. Unfortunately, many critical dimensions of the problem remain under-researched or even entirely undocumented and in those instances experts are able to be of service to judges and other immigration professionals by drawing on their experience to fill in the "knowledge gaps."

In addition to providing country conditions information and assisting immigration professionals to contextualize the facts of a case experts are also able to provide a framework for assessing any past threats or persecution, and for making predictions of future risk to respondents beyond that of the general public, if returned.

Finally, experts are able to contribute in ways that relate directly to the needs of decision makers by assisting immigration attorneys to:

1. Assess the veracity of respondents' claims; and
2. Gather relevant case information.

Assessing the Veracity of Respondents' Claims.

Although there are attorneys with significant experience handling Central American gang and organized crime-based claims, the majority of lawyers involved with these cases are largely unfamiliar with the historical, social and political context of the region and the nuances of gang culture and mentality. As such, it may be difficult for them to assess the credibility of claims, especially because in the vast majority of cases respondents have no ability to document their experiences through police reports, newspaper accounts, medical records, etc.

Experts can assist attorneys to assess certain fundamental questions: Are the facts as presented consistent with realities on the ground in the country in question? Do those facts fit with expert's experience? Does the timelines of events as described fit with historical fact? In short, does the story "hang together" and appear plausible, or is there reason to question the truthfulness of the respondent. If questions still remain, experts may be able to recommend additional steps the attorney might take to further investigate the veracity of the claim, and/or interview the respondent directly in order to gain a more personal perspective on the legitimacy of the claim.

Guidelines for Gathering Relevant Information

Those experienced in working with Central Americans recognize that for a number of reasons it is often difficult to get a full disclosure of facts from respondents. As such, it is important that experts inform attorneys not familiar with Central American culture of these factors and if able, offer guidance as to how they may best address them, as they relate directly to the attorney's ability to obtain all the relevant information and to respondents' ability and willingness to present the facts of their case in a complete manner during Asylum Office interviews and merits hearings. This does not mean the expert would become involved in witness preparation in any way; that would constitute a serious breach of their professional neutrality and objectivity, but assisting attorneys to understand and navigate these communication challenges is often an important function and one that clearly supports the needs of decision makers.

First among these challenges is a cultural communication pattern that plays out like this: "If you don't ask I won't tell, but if you do ask I will." This means that questions must be specific and informed by an understanding of gangs and the socio-political context in which they exist. Without this type of pointed questioning there is a significant possibility that respondents may fail to convey information that is critical to the case and of interest to the court.

Second, because of the communication networks between the U.S. and Central America, respondents are often afraid to disclose information—even to their attorneys or to the court—for fear that the information will make its way into the network and be communicated back to their country of origin, thereby increasing their risk if returned. In addition to increasing their own risk, respondents are often afraid that disclosing information may result in danger to other members of their family. Compounding issues related to trust and safety is the fact that respondents from El Salvador, Honduras and Guatemala do not necessarily feel trust in attorneys or the legal system in the first place. Taken together, these issues underscore the importance of building trust and demonstrating an understanding of the society and culture of the individual respondent.

Related to respondents' fear of disclosing information is the fact that many are affected by post-traumatic stress disorder (PTSD) and in such fear of return that they are not functioning at full capacity. From the standpoint of neuroscience it is clearly recognized that among other things, PTSD affects regions of the brain responsible for cognitive information processing and recall, and that those brain centers may essentially shut down under stress. This has clear implications for respondents' ability to provide information and testify in a coherent and comprehensive manner, and may necessitate the involvement of psychological experts and/or therapists.

Third, there is a frequent tendency for information to be "compartmentalized" within families. Children being recruited, harassed, threatened and assaulted often don't communicate their experiences to their parents; husbands and wives being extorted don't tell their spouses; women that are raped often don't tell their boyfriends and husbands, or even seek medical attention for fear that their family (and assailants) will learn they have done so. In part this is intended to spare one's family members worry and grief, and in part it is because information is often perceived as dangerous. For instance, if a father learns that gang members raped his daughter he may seek vengeance or go to police, either of which may set the stage for further violence not only toward the victim, but also to others in her family. As such, it is often important to contact members of the respondent's family while gathering basic case information, as the individual may not be aware of all the relevant facts. This is particularly true because once in the U.S. or Canada, family members at home often chose not to communicate information about on-going development or threats.

For the reasons cited above, unless it is logistically impossible (e.g., when the respondent is detained and has no phone access, or would be overheard by other detainees) it is imperative that experts conduct interviews with respondents, with their attorneys present. Not only does this better ensure that information relevant to their cases and of interest to decision makers will be disclosed, but it also provides the expert a direct opportunity to assess the veracity of the individual's account and share any concerns with the attorney.

Streamlining the Process for Judges

Experts may also be able to assist in streamlining their testimony during merits hearings by making immigration attorneys aware of the critical facts that judges need in terms of: 1) country conditions, 2) the nuances of gang culture and mentality, 3) factors that influence governments' ability and willingness to control criminal groups and to address respondents' potential security issues if returned, and 4) issues that affect the viability of internal relocation as a strategy for safe repatriation.

In cases involving immigration attorneys experienced with Central American gang and organized crime-based claims this of course may not be necessary. But in my experience a significant percentage of cases, if not the majority, are handled by attorneys with little or no experience with these types of claims. As such, it is often difficult for them to recognize what constitutes the most salient information and to structure experts' direct examination questions in the most efficient manner. Generally speaking, I have found that all critical foundational information can be presented to judges with eight to ten questions but many times attorneys have presented me with lists of over 50 direct examination questions, and that may not even include questions specific to the particular case. My experience is that judges genuinely appreciate the input of experts but given the demands upon them, if direct examination questions are structured so as to limit experts' testimony to the most relevant information, delivered in the most efficient manner, it is clearly of service to judges and the court.

Conclusion

Gangs and other organized criminal groups in Central America have grown in their sophistication and violence in recent years while at the same time the capacity and willingness of governments throughout the region to contain these groups and to protect the public has diminished. In light of the increasing complexity and volatility of the situation, experts continue to play a critical role in terms of their ability to assist immigration and government attorneys, Asylum Officers and immigration judges to accurately assess the many dimensions of the problem and to contextualize case facts in order to arrive at fully informed decisions.

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- ⁷ *Murdered Schoolboys Shake Salvador's Gang Truce*. ABC News, September 9, 2012. <http://abcnews.go.com/International/wireStory/murdered-schoolboys-shake-salvadors-gang-truce-17193373#.UEz4XhivxD0>
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- ¹² Op Cit.
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- ¹⁴ *Honduras: Organized Crime Gained Amid Political Crisis*. James Bosworth. In *Organized Crime in Central America: The Northern Triangle*. Woodrow Wilson International Center for Scholars, Latin America Program. Report on the Americas # 29, September 2011.
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About The Author

Dr. Thomas Boerman has been involved with the gang issue in the U.S. and Latin America since 1995. He has worked as a consultant to numerous governmental and non-governmental organizations addressing the gang phenomenon in El Salvador, Honduras, Guatemala, Panama, and Mexico including the U.N. High Commissioner for Refugees, the U.S. Agency for International Development and its subcontractors, The World Bank, Save the Children-United Kingdom, and numerous private development organizations. In addition to numerous non-publicly available documents, he has authored or contributed to several reports and articles on gangs in general and in Central America in particular, and presented on a broad range of issues related to gangs at approximately 150 events throughout the U.S. Since 2006, he has been credentialed as an expert and provided testimony in over 100 Central American-Mexican gang, organized crime, gender-based and/or sexual orientation immigration matters in U.S. and Canadian immigration courts and provided numerous trainings to a broad range of immigration professionals. He can be contacted at boermanthomas@gmail.com.

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T A B E

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [REDACTED] 630 - San Francisco, CA

Date: NOV 09 2012

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Chelsea E. HaleyNelson, Esquire

ON BEHALF OF DHS: Sean A. Kersten
Assistant Chief Counsel

APPLICATION: Adjustment of status; protection under the Convention Against Torture

The respondent, a native and citizen of El Salvador, appeals an Immigration Judge's June 26, 2012, decision finding him removable and denying his application for adjustment of status under section 245 of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255. The Immigration Judge also denied the respondent's request for protection under the Convention Against Torture. The appeal will be dismissed.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. See 8 C.F.R. § 1003.1(d)(3)(i); see also *Ridore v. Holder*, —F.3d —, 2012 WL 4513230 (9th Cir.2012). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision de novo. See 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's claim was filed after the date of May 11, 2005. Thus, the amendments made to the Immigration and Nationality Act by the REAL ID Act of 2005 are applicable.

We concur with the Immigration Judge that the respondent does not merit, as a matter of discretion, adjustment of status under section 245 of the Act, in conjunction with a waiver under section 212(h) of the Act. Such a grant is an act of administrative grace and discretion and the alien bears the burden of establishing that a grant is merited. *Matter of Aral*, 13 I&N Dec. 494, 496 (BIA 1970). In determining whether a grant of relief is merited in discretion, the favorable and adverse factors must be considered. *Id.* Upon de novo review, we conclude that the respondent, who was convicted of voluntary manslaughter in an incident where the victim's wife and other bystanders were present, and who later tried to dispose of the gun on the side of a highway, and who was sentenced to 16 years imprisonment, has significant negative factors.¹ In addition to criminal

¹ The respondent inexplicably argues on appeal that he acted in self-defense; as the Immigration Judge pointed out, the jury did not accept this claim, I.J. at 2. Furthermore, the length of the respondent's sentence strongly militates against his self-serving claims on appeal that his crime should be considered mitigated, as a discretionary matter, by his alleged fear of the victim, or other alleged circumstances surrounding his offense of voluntary manslaughter.

homicide, it is uncontested that the respondent is present in the United States without having been admitted and paroled, and that, at the time of the crime, he had previously engaged in burglary, which is also a crime that shows strong disregard for the rights of others. Exh. 2.

We acknowledge extensive positive equities. The respondent has engaged in charitable activities since his release from prison. He has, through public speaking and other community activities, tried to encourage others not to follow his criminal and violent path. He has presented evidence that he recently has changed his life and become a religious person. He has a family in the United States, and his removal would cause economic hardship to that family, in addition to the emotional difficulties involved with his relocation to El Salvador. His United States citizen mother and his United States citizen children face significant medical, emotional and economic challenges.

Due both to the seriousness of the respondent's voluntary manslaughter offense and his other criminal offense, and taking into account the totality of the evidence, we conclude, upon de novo review, that the negative factors far outweigh the positive equities asserted and presented. Further, in addition to being a case where the negative factors outweigh the positive factors, as referenced in *Matter of Aral, supra*, this is also, by the same logic, a case that is not one of the very rare cases wherein an alien who has indulged in violent crime qualifies for discretionary relief in immigration proceedings. See *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

The respondent argues that the Immigration Judge did not correctly interpret the legal rule set forth at 8 C.F.R. § 1212.7(d), which is similar to the rule set forth in *Matter of Jean, supra*, regarding certain applications for discretionary relief made by those who have engaged in violent criminal acts. If the Immigration Judge did incorrectly interpret that legal rule, it was harmless error at most. First, we review de novo the Immigration Judge's decision, and the Immigration Judge did not rely on the asserted misinterpretation of the rule to exclude evidence or otherwise deprive the respondent of a full and fair hearing. Further, even if 8 C.F.R. § 1212.7(d) were not applied at all in this case, it is still clear that the negative factors far outweigh the positive equities.

We turn next to the respondent's request for deferral of removal under the Convention Against Torture. In doing so, we note that we review for clear error the question of whether the Immigration Judge's findings of fact are correct. *Ridore v. Holder, supra*. The respondent's claim is, in essence, that as a male person with tattoos (which would be incorrectly perceived as indicating gang membership) he would be tortured in El Salvador. The Immigration Judge found the respondent's facts were equivocal at best and that he did not meet his burden of proof. On appeal, the respondent challenges the Immigration Judge's treatment of the factual basis of his claim, but has not persuasively established any clear factual error in the Immigration Judge's decision. The Immigration Judge's findings of fact, including the finding that the respondent's proposed expert witness was not free of bias, are permissible views of the evidence, and hence not clearly erroneous. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985).

Upon de novo review, we conclude that there is not sufficient evidence in the record to support a conclusion that, if removed to El Salvador, the respondent would more likely than not be tortured at the instigation or with the acquiescence (to include the concept of willful blindness) of a public

official acting in his or her official capacity. See 8 C.F.R. § 1208.16(c)(2) and 1208.18(a)(1); see also *Aguilar-Ramos v. Holder*, 594 F.3d 701, 705-6 (9th Cir. 2010); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-5 (9th Cir. 2003).

In view of the foregoing, there is no basis on which the appeal should be sustained. The following order will be entered.

ORDER: The respondent's appeal is dismissed.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

Matter of

[REDACTED]

Respondent

Date: June 26, 2012

File Number: [REDACTED] 630

In Removal Proceedings

MEMORANDUM

The respondent is a native and citizen of El Salvador. He entered the United States in 1983 without admission. On January 26, 1992 respondent shot a man in the head and chest in a supermarket parking lot, killing him. He was convicted after a jury trial for voluntary manslaughter and the use of a firearm in the commission of a felony and sentenced to sixteen years in prison. He was released in 2000 and arrested by the Department of Homeland Security in 2011. He has conceded removability under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) (alien present without admission or parole) and has been found removable under Section 212(n)(2)(A)(i)(I) (conviction for crime involving moral turpitude). *See Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1193 (BIA 1999) (noting that voluntary manslaughter is one of several crimes that have been "readily characterized" as involving moral turpitude).

Respondent filed an application for asylum, withholding of removal and protection under the Convention Against Torture. He also filed an application for adjustment of status with a request for a waiver of inadmissibility under INA Section 212(h).

I. Background

In the 1980's respondent's mother operated a food stand in El Salvador. The civil war between the FMLN guerrillas and the government forces was in progress at this time. Respondent's mother said that from time to time she would leave food and clothing for the guerrillas. On one occasion she was caught in a cross fire when government troops fired on the guerrillas and respondent's mother was present. On another occasion government soldiers fired at her food stand because they considered she was aiding the guerrillas. Her food stand was later burned by the soldiers and respondent's mother came to the United States.

Respondent stayed in El Salvador with his aunt. When respondent was about 8 years old, he was stopped by soldiers on the street who demanded his school identification. When he could not produce it, the soldiers hit and kicked respondent. He was also hit a year later by soldiers

[REDACTED] 630

because he had an expired school ID card. A friend who tried to intervene was shot by the soldiers. After that, respondent's mother brought him to the United States.

On January 26, 1992 at about 1 a.m. respondent was in a car with friends in the parking lot of a Safeway supermarket. Respondent had decided to take with him his loaded .38 caliber revolver. The respondent and his victim exchanged hostile looks and words. Respondent then pulled out his revolver and shot the victim to death in front of the victim's wife. Respondent and his friends then fled the scene. Respondent threw the loaded gun out of the car. Respondent testified that there were six or seven people standing around the victim when he was shot; any of them could have been injured as well.

Respondent went to trial and asserted that he was in fear from the victim and had acted in self defense. The jury rejected this claim. He was sentenced to 11 years in prison for voluntary manslaughter with an additional 5 years for using a firearm in the commission of the crime.

Respondent is married to a U.S. citizen and has three U.S. citizen children, ages 21, 17 and 15. Respondent's wife is employed and earns between \$55,000 and \$65,000 per year. Her relationship with her mother was poor and so she is very close to respondent and relies on him for emotional as well as financial assistance. Respondent's oldest son has Tourette's syndrome and had attention deficit disorder when he was in high school. He is unemployed. Respondent's daughter Sophia is getting counseling because she can't focus on her schoolwork due to respondent's detention. Respondent's daughter Maria has also lost interest in her studies. All three children and respondent's wife are depressed because respondent is in removal proceedings. None of them would go to El Salvador if respondent is removed.

Respondent's mother is depressed and has been hospitalized because she has attempted suicide in the past. She was diagnosed with posttraumatic stress disorder in the 1980's based on what happened to her in El Salvador. She has heart problems, arthritis, anxiety attacks, depression, and she needs a knee replacement. Respondent said he had observed that she has been depressed since he first came to the United States, even before he went to prison.

She was involuntarily committed in January 2012 because she made what one of her therapists called a "suicidal gesture," this is to say she took an excess of prescription medications and expressed a desire to end her life, although she did not make a fully committed attempt to end her life. Adding to respondent's mother's health problems is the fact that she has another son who committed a homicide in the United States and was deported in 2004. Her therapist feels that her fragile mental health has been exacerbated by respondent's immigration case.

Respondent has a sister who lives in the United States, but he feels she is not as close to his mother as he is because his sister has five children of her own.

Respondent has multiple tattoos on his torso and arms. None of these tattoos are gang tattoos, but he fears that the police in El Salvador may think he is a gang member and harm him.

A couple of individuals who are detained with respondent, one of whom was formerly in the El Salvadoran military, told respondent that this could happen. He also fears that gang members may think that he is a member of a rival gang and harm him.

II. Analysis

A. Adjustment of Status

Respondent seeks to adjust his status to that of a lawful permanent resident. In order to do so, he needs a waiver of inadmissibility under INA Section 212(h) because he has been convicted of a crime involving moral turpitude. In assessing respondent's application for a waiver the court must apply 8 C.F.R. 1212.7(d) which states as follows:

Criminal grounds of inadmissibility involving violent or dangerous crimes. The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The final sentence of this regulation makes clear that the Attorney General contemplated situations in which an alien in fact demonstrated that extraordinary circumstances existed but relief would nevertheless be denied, "depending on the gravity of the alien's underlying criminal offense." It is difficult to imagine an offense that fits the foregoing description better than the intentional taking of another human being's life. Even if we assume that the condition of respondent's mother constitutes an extraordinary circumstance, and even considering respondent's mother's problems together with respondent's other favorable equities set forth in Part I, *supra*, the gravity of this respondent's crime militates against a grant of permanent resident status.

The court is certainly sympathetic to the situation of respondent's mother. But if respondent is in El Salvador, his mother can visit him, can communicate by telephone and by email, or by using any of the variety of media currently available. Mr. Brenes's family can't do any of these things, of course, because Mr. Brenes is dead. The respondent's willful, violent conduct took the victim away from his family forever, about a month before he turned twenty-two years old. See Exs. 39 (victim's obituary) and 38 (letter from the parents, wife and brother of

the victim). To make matters worse, after killing Mr. Brenes and fleeing from the scene of the crime, respondent threw his loaded pistol out of his car in an urban area, creating the potential for still more mayhem. As the Attorney General has noted: "For those aliens, like the respondent, who engage in violent criminal acts during their stay here, this country will not offer its embrace." *Matter of Jean* 23 L. & N. Dec. 373, 384 (A.G. 2002). The gravity of respondent's criminal conduct makes clear that adjustment of status is not warranted in this case, and the application for adjustment is accordingly denied.

B. Asylum and Withholding of Removal

Respondent is ineligible for asylum and withholding of removal because he has been convicted of an aggravated felony, and he received a sentence of at least five years. INA Sections 208(b)(2)(A)(ii) and (B)(i); INA Sections 241(b)(3)(B)(ii).

C. Torture Convention¹

Torture is defined as any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person by, at the instigation of, or with the "consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). Acquiescence requires that the public official have awareness of such activity and thereafter breach his or her legal duty to intervene. 8 C.F.R. § 1208.18(a)(7). Acquiescence by government officials does not require actual knowledge or willful acceptance; for relief under CAT, the respondent "need only prove the government is aware of a third party's torturous activity and does nothing to intervene to prevent it." *Ochoa v. Gonzales*, 406 F.3d 1166, 1172 (9th Cir. 2005). Torture "does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 1208.18(a)(2).

The applicant bears the burden of establishing that it is more likely than not that he would be tortured by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity if removed to El Salvador. See 8 C.F.R. § 1208.16(c)(2); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003). The applicant cannot string together a series of suppositions, all of which are not proven by a preponderance of the evidence, to meet his burden of proof. *Id.*

In assessing whether it is more likely than not that the applicant would be tortured, the Court should consider the following: evidence of past torture inflicted on the applicant; evidence that the applicant could relocate to another part of the country of removal where he is not likely to be tortured; evidence of gross, flagrant, or mass violations of human rights within the country of removal; and other relevant information regarding conditions in the country of removal. See 8

¹ Respondent is ineligible for withholding of removal under the Torture Convention due to his conviction for a particularly serious crime. 8 C.F.R. 1208.16(d)(2). He remains eligible for deferral of removal under the Torture Convention.

C.F.R. §1208.16(c)(3). While evidence of past torture may, in some cases, tend to show a likelihood of future torture, the regulations nowhere contain a provision that past torture creates a presumption of future torture which the government must then rebut.

Although it may seem unremarkable to say that respondent has the burden of proof, that fact carries with it an important implication: if the evidence is inconclusive, respondent has failed to meet his burden of proof. *J-F-F-*, 23 I&N Dec. 912, 917. There is logic in imposing what has been described as the "heavy burden" of CAT on an applicant, *Barríos v. Holder*, 581 F. 849, 856, fn. 6 (9th Cir. 2008), because CAT protection is mandatory. While ordinarily a sovereign government may decide what persons reside within its borders, "the words of CAT ... reach out to protect even the most vile of actors against state vileness' [citation omitted]. Indeed, 'in adopting the [CAT] regulations, the agencies themselves recognized that even those who assisted in Nazi persecutions, or engaged in genocide, or pose a danger to our own security are not excluded from the protections of CAT.'" *Cole v. Holder*, 659 F.3d 762, 770 (9th Cir. 2011).

There is no claim of past torture in this case. Because respondent has not lived in El Salvador since 1983 he had to rely on country conditions documents and the testimony of an expert witness, Thomas Boerman.

Respondent's country condition evidence can be broken down into three main categories: (1) the police are suspicious of persons with tattoos, because gang members have tattoos, and as a result persons with tattoos are stopped and interrogated by the police. *See, e.g. Ex. 4, Tab B*; (2) there are anecdotal but unconfirmed reports that secret "death squads" are killing gang members. *See, e.g. Ex. 4 Tab C-E and Ex. 17, Tab C*; (3) gang members are violent and may try to recruit someone like respondent. *See, e.g. Ex. 17, Tab D*.

It must be borne in mind, as noted above, that it is not enough for respondent to show that *something might* happen to him. He has to show it is probable he will be tortured or killed. Some of the documents submitted by respondent contain very dramatic and sweeping assertions, but there are two conceptual flaws that run through all these documents which diminish the weight the court can give to them. The first is the fact that there is still a gang problem in El Salvador. If simply being a gang member, or being perceived as a gang member, will likely result in torture or death, there should not be a gang problem because not very many gang members would be left. The second flaw is the sheer impossibility, in 2012, in the age of the internet and social media, that the government of El Salvador could torture and kill the majority of the thousands of young males deported to El Salvador year after year without being discovered.

Actual gang members and deportees tell a story different from that told by advocacy groups and social scientists. For example, at p. 91 of Ex. 5 there is an article from the Washington Post. In it a man named Monterosa who has "MS 18" tattooed on his forearm and had a teardrop tattoo which signifies prior prison time for weapons charges said he gets "stopped

by police," and others with tattoos said they got turned down for jobs and schools. They did not say they were tortured by anybody.

Respondent submitted (at Exs. 4 and 17) a popular study called "No Face to Hide" about gang problems in Central America. It also reports suspicions and surmises that some violence attributed to gangs may be the work of vigilante-type "death squads," and that off-duty police officers might be involved in one or more of these groups, but it acknowledges that the level of state involvement is "unclear." For the most part, the study shows that persons who are thought to be gang members because of their tattoos, their associates, or the areas they frequent are frequently stopped and searched by the police, arrested and charged with participating in a gang, and sometimes subjected to police misconduct that falls far short of torture.

Young men from poor areas report being stopped and patted down on a regular basis. Several gang members and ex-gang members said that they were often arrested, held for a few days and then released. Several reported that they were struck or beaten by the police, but in *Kumar v. Gonzales*, 444 F.3d 1043, 1055-56 (9th Cir. 2006) an applicant was "repeatedly and severely beaten with wooden sticks and leather belts by [police] officers who told him that he would be killed if he did not disclose" certain information, and who was detained on numerous occasions by the police. *Id.* at 1047-48. The court of appeals held that, "[a]lthough [the applicant] undeniably suffered abuse in the . . . police station, we are unable to conclude that the IJ's ruling that it did not amount to torture was not supported by substantial evidence." *Id.* at 1055.

Respondent's expert witness was unpersuasive to this court. In his declaration Thomas Boerman, who has never met the respondent and has done no individual research on his case, claimed that it was probable that respondent "would be at high risk of egregious harm or death." But when pressed on cross examination the most he could say was that it was probable that respondent would experience some mistreatment by somebody in El Salvador. This formulation included being stopped by the police, being pushed around by the police, and being harassed by gangs as well as being seriously injured by criminals. This is indeed "some form of mistreatment," but it does not show it is likely respondent will be tortured.

Mr. Boerman was asked how many people had been deported from the United States to El Salvador in last five years, and he did not know. He was asked how many people with tattoos had been deported and he did not know. He was asked how many deportees had been tortured or killed and he did not know. He was asked, in light of this, what the basis was for his assertions about what would happen to respondent. He said he had talked to colleagues and had interviewed, over the last five years, about fifty current and former gang members from Honduras, Guatemala, EL Salvador and the United States. This evidentiary base is so scanty that no responsible adjudicator could give Mr. Boerman's conclusions meaningful weight.

Mr. Boerman acknowledged that of the 74 paragraphs in his declaration, 63 are boilerplate that he uses in every case. While presenting himself as an objective social scientist,

he admitted that he wrote an article for an AILA publication offering advice on how respondents' attorneys can get around the BIA cases rejecting gang-based asylum claims. *See Ex. 48*. He wrote another article explaining how paid experts like himself can assist respondents' attorneys in winning gang asylum cases. *See Ex. 49*. In addition to an inadequate factual basis for his conclusions, it appears Mr. Boerman is not objective in his evaluations as well. He has a financial interest in promoting these claims which undermines the reliability of his conclusions. *See Zheng v. Holder*, 644 F.3d 829, 835,-36 (9th Cir.2011) (upholding IJ rejection of expert testimony where that testimony was based on faulty factual basis).

In sum, respondent has not met the "heavy burden" of showing it is likely he will be tortured in his home country. *Barríos v. Holder*, 581 F. 849, 856, fn. 6 (9th Cir. 2008).

CONCLUSION

This court has carefully reviewed the documentary evidence presented by the parties and listened carefully to the testimony in the case. The respondent ended forever the life of a young man, violently, suddenly, without justification, in front of the victim's wife. He fled the scene to avoid responsibility for his criminal acts. He threw his loaded gun onto a highway where anyone could have found it and injured themselves or others. Under the circumstances of this case this respondent does not warrant adjustment of status to that of a lawful permanent resident. In addition the evidence does not, in this court's view, show that it probable he will be tortured. in El Salvador.

ORDERS: Based on the foregoing, respondent's applications for adjustment of status, asylum, withholding of removal and protection under the Torture Convention are **DENIED**. Respondent is ordered removed to El Salvador.


Anthony S. Murry
Immigration Judge

TAB F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File: A [REDACTED]-656

Date: October 5, 2009

In the Matter of:

[REDACTED]

Respondent.

)
)
) IN REMOVAL PROCEEDINGS
)
)
)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(6)(A)(i) – Alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158 – Asylum.

Section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) – Withholding of Removal.

8 C.F.R. § 1208.16 – Withholding of Removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

ON BEHALF OF THE RESPONDENT:

[REDACTED]

ON BEHALF OF THE GOVERNMENT:

William Padish, Assistant Chief Counsel
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DECISION OF THE IMMIGRATION JUDGE

The respondent requests asylum, withholding under Section 241(b)(3) of the INA, and withholding under the Convention Against Torture ("CAT"). His applications will be denied for the reasons that follow.

I. BACKGROUND

The respondent is a twenty-one-year-old male native and citizen of Honduras. He entered the United States without being admitted or paroled at or near El Paso, Texas, on or about February 2, 2006. The Department of Justice ("DHS") initiated removal proceedings against him through the issuance of a Notice to Appear ("NTA") dated February 2, 2006. The NTA charges the respondent with removability pursuant to Section 212(a)(6)(A)(i) of the INA, 8 U.S.C. § 1182(a)(6)(A)(i), for being present in the United States without being admitted or paroled. Ex. 1.

The respondent began his removal proceedings as a juvenile. At a master calendar hearing, the respondent admitted the factual allegations contained in the NTA and conceded removability. On November 7, 2006, the respondent filed his applications for asylum, withholding, and protection under the Convention Against Torture. Ex. 10. Based on the respondent's admissions, the Court finds that alienage and removability have been established by clear and convincing evidence as required by Section 240(c)(3) of the INA, 8 U.S.C. § 1229a(c)(3). *See also* 8 C.F.R. § 1240.8(a). As the respondent declined to designate a country of removal, the Court will designate Honduras, the country of citizenship, in accordance with Section 241(b)(2)(D) of the INA, 8 U.S.C. § 1231(b)(2)(D). The Court has jurisdiction to consider the respondent's applications under 8 C.F.R. § 1240.1(a)(1)(ii).

II. ISSUES

The issues addressed below include: 1) whether the respondent is credible; 2) whether the respondent suffered past persecution and can establish a well-founded fear of future persecution on account of his membership in a particular social group; and 3) whether the respondent faced persecution by a group that the government is unable or unwilling to control.

III. CLAIM AND EVIDENCE PRESENTED

The respondent fears persecution by the Mara 18 street gang on the basis of his membership in the particular social groups he defines as 1) male members of the [REDACTED] family; 2) male members of Honduran families who have been victimized by gangs; and 3) Hondurans who witness gangs commit murder.

The court heard testimony from the respondent; the respondent's uncle, [REDACTED]; the respondent's mother, [REDACTED], and Dr. Thomas Boerman.

A. The Respondent's Testimony and Documentary Evidence

At an individual hearing on October 27, 2008, the respondent testified to the following:

The respondent was born on May 15, 1988 in Choloma, a small city in Honduras. Ex. 23. The respondent grew up with his parents, [REDACTED] and [REDACTED], in Choloma and is the only child from his parents' marriage. Ex. 22, Tab 16. The respondent resided in Choloma until he came to the United States on February 2, 2006. His father, [REDACTED], lived in Choloma for forty years. The respondent has two step-siblings from his mother's side, [REDACTED] both of whom live with the respondent's maternal grandmother in El Tigre, a city one hour from Choloma. The respondent also has three step-brothers from his father's side, [REDACTED] (deceased), and [REDACTED], who was killed by the Mara 18. Ex. 22, Tab 16 & Ex. 23. The respondent did not attend school beyond the second year of secondary school. Ex. 22, Tab 16. The respondent also has a son, [REDACTED], born on April 11, 2006 in Honduras. Ex. 23. The respondent testified that he left Honduras before his son was born because the Mara 18 street gang wanted to kill him. Ex. 22, Tab 16.

Growing up, the respondent spent much time with his father and helped out at the family grocery store. Ex. 22, Tab 16. The respondent testified that the majority of the community recognized him as the son of [REDACTED], as he was the closest to his father. Ex. 22, Tab 16. The respondent's father did not like anything about delinquency and was heavily protective of his family. If someone were to touch his family, the respondent's father would react aggressively. In his affidavit, the respondent stated that his father had previous issues with his step-son, nicknamed "Chino," who was a very powerful member of the Mara 18. During a confrontation between the respondent's father and Chino, the respondent's father assaulted Chino. Ex. 22, Tab 16. Chino subsequently died en route to the hospital, when the vehicle carrying him was involved in an accident. *Id.* The respondent's father was sentenced to four years in prison for the murder of Chino. *Id.* After the respondent's father was sent to prison, members of the Mara 18 spread the word that they were going to kill the respondent's father when he was released from jail. *Id.* However, when the respondent's father was released from jail around 1999, "things had cooled down a little with the Mara" because new gang members who did not know the respondent's father had come into town and the police were cracking down on the gang. *Id.*

The respondent testified that his family's problems with the Mara 18 began anew with his uncle on his father's side, [REDACTED]. The respondent was eleven or twelve years old at the time. In 2000, two members of the Mara 18 gang broke into [REDACTED]'s house in Choloma. The men tied [REDACTED] up, robbed him, and raped his wife in front of him. Ex. 22, Tab 16. The respondent's father went to see what was happening and found his brother tied up. The respondent's father, along with the respondent's uncle, then reported the crime to the police. The police eventually caught one of the two individuals. The respondent testified that after his father and uncle filed the police report, the Mara 18 became enraged. They would come around the house and harass his uncle [REDACTED]. A year later, [REDACTED] was shot at by the Mara 18. [REDACTED] had gone with friends to celebrate Christmas at his friend's house. Members of the Mara 18 arrived and began shooting at him. [REDACTED] received two wounds, one to the stomach and one to his head. Another person was killed during this incident. The respondent testified that his uncle [REDACTED] was in critical condition and was hospitalized for approximately one year.

The respondent's father was with [REDACTED] when he was taken to the clinic. The respondent testified that shortly after his father and uncle arrived at the clinic, members of the Mara 18 arrived at the hospital. The respondent testified that the entire incident was reported to the police by doctors of the hospital and the respondent's father. After the report was filed, members of the gang went by the respondent's father's house. The respondent testified that one night, while his father was drinking, his father threatened to avenge the shooting of his uncle [REDACTED] Ex: 22, Tab 16. About two or three days after his uncle was shot, while the respondent and his parents were sleeping, the gang put a black tie at the door. The respondent testified that the black tie signified death. Ex. 22, Tab 16. The respondent believed that the gangs were responsible for the black tie because they were the ones with whom the respondent's family had problems. The respondent was twelve years old at the time and did not know much about the black tie. However, he remembered that he felt very sad for his father.

On New Year's Eve, 2002, the Mara 18 killed the respondent's father. Ex. 22, Tab 16. The respondent speculated that the Mara 18 knew that his father was a respectable man and that the gang proposed that they would end the conflict before the respondent's father could kill them. The respondent also testified that he was nearby when his father was killed. He was at a dance when someone came in and reported that the Mara 18 had killed his father. Ex. 22, Tab 16. The respondent testified that he then ran out to see if it was true. When the respondent saw his father dead, he tried to pursue the murderers, but failed to find them. Ex. 22, Tab 16. The respondent testified that he initially wanted to do something about it; however, his mother and family advised him not to seek revenge but instead to go to the judge. A few years after his father's death, the police investigated the murder and arrested a man named Tiner. *Id.* Tiner admitted to killing the respondent's father and was sentenced to fifteen years in prison.

The respondent testified that he learned from other people that the Mara 18 wanted to kill him. Neighbors, after hearing members of the Mara bragging that they were going to kill the respondent, told him, "You're going to die the same as your father." Ex. 22, Tab 16. The respondent called the police, who responded by sending a special anti-gang unit to guard the family at his father's wake. *Id.* The police stayed and watched the house for the rest of the day. *Id.* Because of the police presence, no gang members came by the house that day. After that day, the respondent did not stay at the house. The respondent would visit his parent's house only during the day. He also stayed with his aunt's cousins in Ceba, a city about three hours from Choloma, on several occasions. *Id.* Eventually, the respondent returned to his house because he had to help his mother at the family grocery store. *Id.* The respondent was constantly afraid that the Mara 18 would find and kill him. Although, in his affidavit, the respondent stated that around the time he and his mother went back to the house, "the secret police started killing the Mara and the gang environment cooled down." *Id.*

Three to six months after the death of the respondent's father, the respondent's brother [REDACTED] of his father's side, was killed by the Mara 18. The respondent was twelve to thirteen years old at the time. The respondent testified that the gang knew that [REDACTED] was the son of the

respondent's father because [REDACTED] resembled their father. Ex. 22, Tab 16. The respondent then became very concerned that the gang would kill him too. At the time [REDACTED] was shot, the respondent was staying at his aunt's house. *Id.*

Prior to his decision to leave Honduras in 2006, the respondent had other run-ins with the Mara 18. One day, a *paisa*, or bodyguard of the Mara 18, named Abel came to the house on a bicycle and went up to the gate of the respondent's family property. Ex. 22, Tab 16. The respondent testified that he went out to inquire what was happening, and Abel fired two shots at the respondent. *Id.* Fortunately, the respondent was not hit and ran back to the house and remained there. The respondent did not report this incident to the police because he was afraid that Abel would kill him if he did so. *Id.*

Around 2005, the respondent witnessed a murder of another individual named [REDACTED], unrelated to the respondent, by the Mara 18. Ex. 22, Tab 16. The respondent was taking care of customers at the store when a man arrived and stopped [REDACTED]. *Id.* The man and [REDACTED] were arguing about a bicycle. *Id.* The respondent testified that Mario was afraid and wanted to run, but the man came in and killed [REDACTED]. The respondent did not know the name of the killer, but that people used to call him [REDACTED]. The family of the deceased arrived later and questioned the respondent regarding whether he knew who had killed [REDACTED]. *Id.* However, the respondent told the family that he did not know who had killed [REDACTED]. The respondent testified that he did not tell the family because he was afraid that he would be killed by the man for having witnessed the murder. Later, the man who killed [REDACTED] came to the respondent's house and asked him if he told [REDACTED] family anything. The respondent answered that he did not. [REDACTED] twice warned the respondent that if he were to say anything, he was going to kill the respondent. *Id.*

Another time, the respondent was working at the grocery store when a young man, supposedly a member of the Mara 18, came and asked the respondent to give him a ride. The respondent declined to give this young man a ride because the respondent saw his tattoos. The respondent testified that the young man was later killed. Afterwards, members of the Mara 18 came by the shop and asked the respondent's friend for the whereabouts of the respondent. The respondent's friend told the gang members that the respondent used to work at the shop, but that he was not there at the moment. When the respondent's friend asked the gang members why they were looking for the respondent, they replied that they were looking for the respondent in order to kill him, because they thought he (the respondent) killed the young man. The respondent did not mention this incident in his affidavit and admitted so at his individual hearing.

The respondent testified that he did not leave Honduras until 2006 because he did not have the money to leave. Ex. 22, Tab 16. He believes that the Mara 18 would kill him if he were to return to Honduras. He also stated in his affidavit that the gang might be angrier with him now because he has been hiding from them. *Id.* He testified that members of the Mara 18 had gone to ask his mother about him. Furthermore, his uncles would not be able to protect him in Honduras. *Id.* He testified that the Mara 18 would still be interested in killing him because they believe that

the respondent would seek revenge for his father's death. According to the respondent, in Honduran culture, one is expected to avenge the death of a loved one. The respondent explained that the Mara 18 would think that because he is now older and has been in the United States, he may have enough money to procure weapons. Although the respondent could not say how other families were treated by the Mara 18, he believes that his family was targeted because his father did not like anybody to hurt his family. Finally, the respondent stated that he would not be able to relocate elsewhere in Honduras because the delinquency and gang problem is everywhere.

B. [REDACTED] Testimony and Affidavit

At an individual hearing held on October 27, 2008, the respondent's uncle, [REDACTED] testified to the following:

Mr. [REDACTED] was born on April 20, 1981 in Choloma, Honduras. Ex. 22, Tab 19. The [REDACTED] family lived in Choloma for forty years. Mr. [REDACTED] testified that Choloma is a small city, the type of place where people know everyone.

Mr. [REDACTED] averred in his affidavit that he departed Honduras in August 2007, fearing that the Maras would kill him. His problems with the Mara 18 began on December 23, 2000, when two Mara 18 members named Byron and Moncho broke into his house, assaulted, and robbed him. Ex. 22, Tab 19. They raped his wife (girlfriend at the time) in the same room where they had tied him up. *Id.* He reported this incident to the police, who were able to detain Moncho. *Id.* After the incident, Mr. [REDACTED] would sometimes find Byron on the block where he used to live. Byron would threaten Mr. [REDACTED] at least once a week because his brother Moncho was being prosecuted. Byron also said that Mr. [REDACTED] would pay for putting his brother in prison. *Id.* To this day, Moncho is still incarcerated but is scheduled for release soon. *Id.*

A year later, on December 24, 2001, Mr. [REDACTED] was celebrating Christmas Eve at a friend's house. Ex. 22, Tab 19. Members of the Mara 18 came by and shot [REDACTED] leaving him for dead, and killed his friend Santos. He testified that there were three men and their faces were uncovered, yet in his affidavit he stated that there were four men and their heads were covered.¹ *Id.* Mr. [REDACTED] was shot in the stomach and head, and he was taken to the hospital. The respondent's father was with him at the hospital. Three minutes after arriving at the hospital, gang members arrived, asking for Mr. [REDACTED]. In his affidavit, he also stated that after he was released from the hospital, members of the Mara 18 would beat him up regularly. Ex. 22, Tab 19.

¹ The Court notes several inconsistencies between Mr. Pineda's testimony and his affidavit. However, the inconsistencies were insignificant, and only referred to his personal experience with the gangs and not the respondent's claim.

Mr. [REDACTED] testified that the respondent's father, [REDACTED] reacted violently to this incident. Agustin said that he wanted the gangs to be punished for what they had done. Mr. [REDACTED] testified that when the gangs heard that, they issued a threat to Agustin's life.

Mr. [REDACTED] confirmed that the man who killed the respondent's father, Tiner, was eventually arrested, convicted of murder, and was sentenced to prison. Ex. 22, Tab 19. However, he testified that his family is still at risk from the Mara 18 after Tiner's arrest because Tiner is the boss of the local Mara 18, and if he commands the gang to do something, they would do it. Mr. [REDACTED] testified that the gang would kill the respondent if he were to return because they are afraid that he will seek revenge due to the Honduran belief that those whose family members are killed will seek vengeance.

C. [REDACTED] Molina's Testimony and Affidavit

The testimony of the respondent's mother, [REDACTED], on May 18, 2009 is summarized as follows.

Mrs. [REDACTED] was born on April 18, 1966 in Choloma, Honduras, where she resided before leaving for the United States. She was married to the respondent's father. She sold food in Honduras, raised pigs with her husband, and operated a store located in the family's house. The store, which sold grains, rotisseries, and bread, was one of three groceries in Choloma. Mrs. [REDACTED] testified that their store was popular because, unlike other stores, they offered credit to customers and because she treated her customers well. Her family members were the only employees of the store, and the store serviced approximately thirty customers a day. The family lived in a small house with two bedrooms. In addition to the family's house, there were about ten apartments on the property that belonged to her father-in-law, which he would rent out.

During her testimony, Mrs. [REDACTED] recounted her husband's confrontational relationship with the gang. He would tell the gang to get off his property and to never speak to his son. *Id.* He did not like the gang hanging around the property and smoking drugs. Ex. 22, Tab 23. After [REDACTED] was shot by the gangs, Agustin tried to do something about it and reported the incident to the police. Mrs. [REDACTED] testified that the Mara 18 got very upset because the police arrested members of the gang as a result of the police report. In fact, a week prior to her husband's death, on December 23, the gang placed a black tie at their house, signifying death. She believes that the Mara 18 killed her husband because he reported them to the police.

Mrs. [REDACTED] testified that on the day of the wake for her husband, members of the Mara 18 arrived. After that, she was very scared to go home and stayed at a neighbor's house. The respondent would sleep in his aunt's house, three blocks from the family's home, because he, too, was afraid to sleep at his own house. She testified that the respondent could not remain at his

aunt's house because the gang would sometimes go there as well. After staying with her neighbor for three months, Mrs. [REDACTED] returned to her house because she had to open the store. She testified that the gangs would always arrive at the house and ask whether they saw who killed [REDACTED] her husband. They also said that the respondent was going to take revenge because they killed his father. Further, they would come to the store and take things without paying her. These gang members would also give her trouble and ask her to make them food. When asked how she knew they were gang members, she stated that she identified them because of their tattoos and t-shirts.

During this time, the respondent was still living at his aunt's place, and the gang would ask Mrs. [REDACTED] for him. When questioned about why the gang would ask for the respondent, Mrs. [REDACTED] replied, "Because he is Agustin's son." Despite her problems with the gang, however, she did not report the issues to the police. She stated that she could not report them because the gang was always watching her, effectively putting her on house arrest, and that she could not even talk on the phone.

In her affidavit, Mrs. [REDACTED] stated that the respondent came to her one day and said that he did not want her to have problems with the Mara because of him. Ex. 22, Tab 23. Therefore she procured a loan in order for him to come to the United States. *Id.* For an unspecified amount of time, the Mara would come by the house every three days until the respondent left for the United States. *Id.* She testified that after the respondent left, she saw the gang members everyday. In her affidavit, Mrs. [REDACTED] stated that she had once asked the gang members why they were looking for the respondent, asking why it was not enough that they had already killed his father. *Id.*

By the time Mrs. [REDACTED] left Honduras in 2008, the Mara 18 had taken over her property and the store. She testified that they had also started occupying the apartments on the family's property shortly after her husband died. When her father-in-law tried to drive the gang members out, they told him, "You old man, just get out of here, because with one gunshot we could just remove you." Mrs. [REDACTED] testified that she asked her daughter, the respondent's step-sister, to live with her. Her daughter, Vanessa, was staying with Mrs. [REDACTED] mother in El Tigre at the time. Vanessa and her kids went back to El Tigre after this incident and remain there to this day. Mrs. [REDACTED] testified that she did not report this incident to the police because she believed that if she had done so, the gang would have killed her. She testified that the gang would say that it was going to be her fault if the police arrived to get them.

D. Dr. Thomas J. Boerman's Testimony and Affidavit

The respondents contends that Dr. Boerman's testimony should be considered as expert. Despite testimony concerning his background and after consideration of his curriculum vitae, the Court declined to recognize Dr. Boerman as an expert on gangs in Central America. The Court

observed that the witness's educational speciality was in special education rather than gang behavior. Moreover, Dr. Boerman completed his studies only recently, and only published one article on gangs (with two pending). His limited background does not support the respondent's contention that he has specialized knowledge or experience which would enable him to make an expert judgment on the respondent's asylum claim.

Notwithstanding this ruling, Dr. Boerman was allowed to testify as a lay witness on May 18, 2009, opining for over an hour about gangs in general and the Maras in Honduras in particular. He was proffered as an expert on gangs in Central America, and specifically about gangs in Honduras.

In his affidavit, Dr. Boerman stated that in some respects, the gang problem in Honduras is more significant than in any other part of Central America. Ex. 22, Tab 12. He testified that government data indicates that there are 36,000 gang members in Honduras. There are two main gangs in Honduras: the Mara Salvatrucha (MS) and the Mara 18. One important norm in gang culture is the concept of respect and fear. Dr. Boerman testified that being respected is the same as being feared. It is the basis of establishing a reputation as violent, dangerous, and unpredictable. He testified that it is a central feature of gang life to be feared by rivals, neighbors, members of the community, and by the police. Ex. 22, Tab 12. Dr. Boerman also testified that the gangs perform acts which constitute terror, including threats, assault, homicide, and rape of family members of individuals designated as targets by gangs.

In his affidavit and testimony, Dr. Boerman stated that the Honduran government has instituted a program known as "Mano Dura" or "firm hand" in 2001 to address the gang problems in the country. Ex. 22, Tab 12. Under Mano Dura, amendments to Section 332 of the Honduran Criminal code were made to criminalize illicit association, or gang membership independent of the commission of other crimes. *Id.* It also gave the police authority to make arrests for gang association alone and allowed for imprisonment for periods of three to twelve years. *Id.* Dr. Boerman testified that in spite of the "Mano Dura" policy, police themselves are ineffective against gangs.

Dr. Boerman finds that the respondent's claims are consistent with his knowledge that gang members will often engage in witness intimidation and terrorization of a family into silence. Ex. 22, Tab 12. He stated that once a gang decides to go after a family, the gang purposefully wants to sustain terror over time. *Id.* Furthermore, Dr. Boerman claims that the respondent cannot avoid the danger of gang members by relocating to another part of Honduras. "Gangs in Honduras have developed incredibly sophisticated networks that allow them to communicate amongst themselves, and locate individuals identified for retaliation." Ex. 22, Tab 12.

E. Country Conditions in Honduras

The record contains the 2000, 2005, and 2007 State Department Country Reports on Honduras, the June 2008 State Department Background Note on Honduras, as well as a 2006 United States Agency for International Development Central America and Mexico Gang Assessment profile on Honduras. Ex. 22, Tabs 2 & 42, Ex. 25, Ex. 26, and Ex. 22, Tab 1, respectively. In addition, the record contains various news articles, United Nations reports, and reports by Amnesty International and other non-governmental organizations. Ex. 22.

The United States Agency for International Development reports that Honduras is considered one of the most violent countries in Latin America. Ex. 22, Tab 1. In 1999, the homicide rate was 154 per 100,000 residents, which was attributed largely to gangs, organized crime, drug trafficking, and social violence. *Id.* Most of the crimes take place in the major urban centers of Tegucigalpa and San Pedro Sula. Gangs have become more sophisticated over the years, and many have become involved in trafficking of drugs and arms. *Id.* Up until 2000, gangs used homemade weapons. *Id.* Recently, gangs have become more dangerously armed, acquiring M-16s, AK-47s, and grenades. *Id.*; see also Ex. 22, Tab 4.

The Department of State's 2007 Country Report indicates that there were approximately 30,000 to 40,000 gang members, many of them youths, belonging to nearly 500 separate groups or subgroups in Honduras. Ex. 25. Other reports indicate that approximately 5,000 members actively engaged in criminal activities. *Id.* Gang members contributed to approximately twenty to fifty percent of violent crime in the country. Gang membership was confined primarily to the Tegucigalpa and San Pedro Sula areas. *Id.* The MS-13 and the M-18 were the largest and most violent of the gangs in Honduras. *Id.* Together the two gangs accounted for approximately forty percent of gang membership in the country. *Id.* Through November 2007, the Ministry of Public Security reported that forty-three police officers were killed by unknown actors, noting that gangs may have committed some of these killings. *Id.*

Elected to office in 2001, then-Honduran President Ricardo Maduro vowed to crack down on the rampant gang violence and followed through with his pledge of zero tolerance. Ex. 22, Tab 3. Honduran law outlaws "illicit associations," including gang and organized crime membership, and allows for prison terms ranging from three to twelve years, depending on the individual's level of involvement and seniority. Ex. 25. This campaign against the *maras*, or gangs, is based on Article 332 of the Penal Code and known as *Ley Anti-Maras*, under which youths with tattoos can be detained and processed. Ex. 22, Tab 1. As of November 2007, 463 persons were detained for illicit association. Ex. 25. About forty percent have been sentenced, and the rest are awaiting sentencing. Ex. 22, Tab 1. Police and the military continued joint patrols of the streets, where gang violence and intimidation remained serious problems. The government has also stationed security officers on many public buses as gangs continued to harass, threaten, and rob passengers on public transportation. Ex. 25. There has also been regional coordination between El Salvador, Guatemala, Honduras, and Nicaragua, as well as cooperation with U.S.

departments and agencies to address the gang issue, especially against the MS-13 and M-18. Ex. 22, Tab 4.

Honduras has adopted a hard-line law enforcement approach to dealing with gangs. Thus most government resources go toward law enforcement, and little is allocated for prevention and intervention. Ex. 22, Tab 1. Police officers believe that they do not have adequate resources to deal with the problem of youth violence. *Id.* As the government responds aggressively to the gang phenomenon, execution of street children has increased. *Id.* The Department of State 2007 Country Report also shows a high number of killings of adolescents, perceived to be gang members, in urban areas. Ex. 25. Information indicated that some law enforcement officials in their private capacity, and not as agents of official policy, participated in many of these killings. Moreover, they enjoyed a climate of impunity due to public opinion that favored a strategy of "social cleansing" toward alleged gang members and other juveniles suspected of criminal activities. *Id.* Casa Alianza, an international NGO involved with youth issues, reported that 2,825 youths were killed between 2001 and 2006, and about thirty-five youths are killed each month. Ex. 22, Tab 1. Although the *Ley Anti-Maras* or *Mano Dura* policy has had mixed results, with some reports indicating a decrease in gang membership and anecdotal evidence suggesting hardened initiation rites and increased involvement in organized crime, there is consensus that more resources should be devoted to prevention and intervention. *Id.*

IV. ANALYSIS

A. Asylum

Under Section 208(b) of the INA, 8 U.S.C. § 1158(b), asylum may be granted to an alien who is physically present in the United States if the alien meets the statutory definition of a "refugee." A "refugee" is defined as an individual who is unable or unwilling to return to his or her native country "because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). The applicant ultimately carries the burden of establishing statutory eligibility for asylum. 8 C.F.R. § 1208.13(a); *Matter of Acosta*, 19 I&N Dec. 211, 214-15 (BIA 1985), *overruled in other part by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

1. Credibility

As the respondent's application was filed on November 7, 2006, the credibility provisions instituted by the REAL ID Act govern.² Consistent with the REAL ID Act, the following factors may be considered in the assessment of an asylum applicant's credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, whether or not such inaccuracy or falsehood goes to the heart of the applicant's claim. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii); see *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).

The REAL ID Act allows an immigration judge in asylum cases to rely on inconsistencies, inaccuracies, and falsehoods in a witness's testimony as a reason to discredit a witness's testimony without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. *Mitondo*, 523 F.3d at 787-88. The immigration judge does remain obliged to distinguish between inconsistencies that are material and those that are not. *Krishnapillai v. Holder*, 563 F.3d 606, 617 (7th Cir. 2009) (citing *Kadia v. Gonzales*, 501 F.3d 817, 822 (7th Cir. 2007)). Further, an applicant's testimony standing alone, if credible, may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. §§ 1208.13(a) (asylum), 1208.16(b) (withholding); see also *Georgis v. Ashcroft*, 328 F.3d 962, 969 (7th Cir. 2003). This is so where the testimony is specific, detailed, and convincing. See *Dawoud v. Gonzales*, 424 F.3d 608, 612-14 (7th Cir. 2005).

I find the respondent testified credibly regarding his personal experiences as they relate to his asylum application. However, although the respondent testified at considerable length and provided many details on his mistreatment by the Mara 18 gang in his town in Honduras, he failed to present a believable rationale supporting his contention that the gangs would be motivated to harm him three years after he departed Honduras. Moreover, his testimony that gang members who were involved in isolated disputes with his father and uncle would seek vengeance on him on his return to Honduras is belied by the undisturbed presence of a number of his family members there, and his own experience there prior to his departure, which does not include any incident in which he was physically harmed.

2. Past Persecution on Account of Membership in a Particular Social Group

The Seventh Circuit has set forth a three part test for assessing asylum claims based on membership in a particular social group. Specifically, an alien must: (1) identify a particular social group; (2) establish that he is a member of that group; and (3) establish that his well-

² The REAL ID Act's credibility and corroboration provisions govern asylum applications made on or after May 11, 2005. INA § 208(b)(1)(B) note 65.2, 8 U.S.C. § 1158 note (Effective and Applicability Provisions) (2005).

founded fear of persecution is based on his membership in that group. *Iliev v. INS*, 127 F.3d 638, 642 n.3 (7th Cir. 1997); *Sharif v. INS*, 87 F.3d 932, 936 (7th Cir. 1996). The Seventh Circuit has stated that the characteristic that defines a social group is one that a person either cannot change or, as a matter of conscience, should not be required to change. *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005). The Board of Immigration Appeals ("BIA") has also stated that the individual must be a member of a group of persons all of whom share a common, immutable characteristic. *Acosta*, 19 I&N Dec. at 233 (BIA 1985). In *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), the BIA held that the social visibility of the members of a claimed social group is an important consideration in identifying the existence of a "particular social group" for the purpose of determining whether a person qualifies as a refugee. In *C-A-*, the BIA ruled that the identified social group of "former noncriminal drug informants working against the Cali drug cartel" does not have the requisite social visibility to constitute a "particular social group" within the meaning of the Act. *Id.* More recently, the BIA held that in determining whether a particular social group exists, another factor to consider, in addition to social visibility, is whether the group can be defined with sufficient particularity to identify its membership. *Matter of A-M-E & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007) (finding that the terms "wealthy" and "affluent" are too amorphous to provide an adequate benchmark for determining group membership).

Having carefully considered the respondent's testimony and the record of proceedings concerning the nature of the contact the respondent had with the Mara 18, the Court finds that these incidents were not inflicted on account of a ground protected under the Act.

a) Social Group

Two of the respondent's proposed social groups are not particular social groups for purposes of the INA. The Court finds that "male members of Honduran families who have been victimized by gangs" does not constitute a social group for asylum purposes because a social group cannot be circularly defined by its risk of persecution. Furthermore, "male members of Honduran families who have been victimized by gangs" and "Hondurans who witnessed gangs commit murder" lack the social visibility to meet the requirement of particularity.

The BIA has concluded that a cognizable social group requires "a group of persons who share a common characteristic other than their risk of being persecuted," and "cannot be defined exclusively by the fact that [the group] is targeted for persecution." *C-A-*, 23 I&N Dec. at 74. In *Rreshpja v. Gonzales*, the Sixth Circuit found that a class of young Albanian women who are forced into prostitution is not a social group, partly because "a social group may not be circularly defined by the fact that it suffers persecution." 420 F.3d 551, 556 (6th Cir. 2005). Yet the key element of the respondent's proposed group of "male members of Honduran families who have been victimized by gangs" is that its members have been targeted by gangs for some unspecified reason. The respondent's circular definition of himself as a member of a particular social group

that fears persecution because it has been targeted for persecution falls short of a cognizable social group for purposes of the INA.

Moreover, the respondent's social group of "male members of Honduran families who have been victimized by gangs" is too broad to constitute a particular social group. Excised of the segment which refers to the risk of persecution, "male members of Honduran families" lacks particularity and is not cognizable because the group is too large. See *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1199 (11th Cir. 2006) (holding that informants working against a Colombian drug cartel are not a social group because their defining attribute is persecution and they are too numerous and inchoate); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009) (finding that "young Honduran men who have refused to join MS-13" is too broad and diverse and not sufficiently particular (citing *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005) and *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986))); and *Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2009) (finding that "Salvadoran youth who have resisted gang recruitment" lacks particularity because it makes up "a potentially large and diffuse segment of society").³

In order to be "particular", a social group must be "recognized, in the society in question, as a discrete class of persons." *S-E-G-*, 24 I&N Dec. at 584. The respondent's classification of "male members of Honduran families who have been victimized by gangs" is not sufficiently particular to constitute a discrete class of persons. The respondent gives no indication of how many "male members of Honduran families" have been victimized by gangs. Neither does Dr. Boerman provide any concrete statistics as to what percentage of male family members have been victimized by gangs. In order to constitute a particular social group for the purpose of asylum, the social group must be "perceived as a group by society," i.e., it must have existence outside the respondent's asylum application. See *C-A-*, 23 I&N Dec. at 958-60. It appears that the respondent's claimed social group is a descriptive construct which has no currency outside of the respondent's case.

The Board has interpreted the term "social visibility" to mean that the group possesses characteristics which others in society recognize. The Seventh Circuit recently criticized this formulation in *Gatimi v. Holder*, ___ F.3d ___, No. 08-3197, 2009 WL 2568952 (7th Cir. August 20, 2009), finding that "[i]f you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the targeted group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population'". See *Gatimi, supra*, at 3.

³ On July 28, 2009, the Board granted a joint motion to reopen *Matter of S-E-G-* and remanded the case for further proceedings in accordance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (see § 235(d)(7)(B)), to allow the respondents, who were minors at the time of filing for asylum, to have their applications adjudicated by the asylum office. As the respondent was eighteen at the time he filed for asylum, the terms of the Wilberforce Act do not apply in this case.

In *Gatimi*, the Seventh Circuit focuses on the physical markers of social visibility; namely, that an individual can only be "socially visible" if he is in plain view. *See id.* at page 7. This misconstrues and misapplies the Board's criteria of social visibility.

In its decisions discussing social visibility, the Board never advocated a literal construct of the term "social visibility." In *C-A-*, the Board equates "social visibility" to "recognizability" and notes that many of its decisions acknowledge social groups that "involve[] characteristics that [are] highly visible and recognizable by others in the country in question." *See C-A-*, 23 I&N Dec. at 960 (citing *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (young women of a particular tribe who were opposed to female genital mutilation); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (persons listed by the government as having the status of a homosexual); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (former members of the national police)).

In *Kasinga*, the Board held that "young women of a particular tribe who are opposed to FGM" was a social group. 21 I&N Dec. at 365. As noted in *C-A-*, this group had highly visible and recognizable characteristics by others within Kenyan society, even though these characteristics were not *visible markers* that were in plain view. *See C-A-*, 23 I&N Dec. at 960. Furthermore, there was evidence that the group was more than a construct of characteristics of people who had been victimized.

In contrast, there is little evidence that the respondent's proposed groups of "male members of Honduran families who have been victimized by gangs" and "Hondurans who witnessed gangs commit murder" have ever been recognized as highly visible in the private or public sector in Honduras. Even if the designation of "male members of Honduran families who have been victimized by gangs" was not rejected for its circular definition, the respondent has not shown that members of society perceive those with the characteristic in question as members of the group. *See C-A-*, 23 I&N Dec. at 956. The fact that the respondent's neighbors knew that the gang was after the respondent because they overheard as much hardly places him in a group recognized by society. *See Ramos-Lopez*, 563 F.3d at 862 ("While MS-13 members may be able to identify those who have resisted recruitment, it is not because the group, as a group, is visible; rather, MS-13 members appear to keep tabs on individuals who have refused to join."). Similarly, the respondent's other social group, defined as "Hondurans who witnessed gangs commit murder," lacks the requisite social visibility to satisfy particularity. While a shared past experience may define a social group under *Acosta*, 19 I&N Dec. at 233, the respondent did not establish that there are characteristics about individuals who have witnessed gangs commit murder that make them identifiable in society. *See C-A-*, 23 I&N Dec. at 956. As such, there is no way of knowing how many such people there are to delineate the parameters of the group. Therefore, the "particularly" criteria has not and can not be met.

b) Nexus

In order to meet the definition of a refugee for purposes of asylum, an applicant must show a nexus between his fear of harm and his membership in a particular social group. See *Wang v. Gonzales*, 445 F.3d 993, 998 (7th Cir. 2006). The respondent must demonstrate that he possesses a trait or characteristic that his persecutor wanted to punish or to overcome in order to meet the well-founded fear of persecution standard. See *Acosta*, 19 I&N Dec. at 226, modified in *Mogharrabi*, 19 I&N Dec. at 446. An asylum applicant must show that it is reasonable to conclude that he was harmed at least in part due to his membership in a social group. See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (stating that the respondent must show *some* evidence that his persecutor's motives were based on his political opinion).

The respondent has not met his burden to show that his persecutors were motivated by his membership in the particular social group he defines as "male members of the [REDACTED] family." In determining whether alleged persecution is based upon a protected ground, the United States Supreme Court has specified that the persecutor's motivation for his or her persecutory act is controlling. *Elias-Zacarias*, 502 U.S. at 482. For example, in *Mema v. Gonzales*, 474 F.3d 412, 417 (7th Cir. 2007), the Seventh Circuit stated that the petitioner must show that his "persecutors attributed a political opinion to [him], and this attributed opinion was the motive for the persecution." The "mere existence of a generalized . . . motive underlying [the persecutors' actions] is inadequate to establish . . . the proposition that [the alien] fears persecution *on account of*" a protected ground as required by the INA. *Id.* at 482.

Where different reasons for inflicting harm exist, an applicant does not have the "unreasonable burden of establishing the exact motivation of a 'persecutor'". *Fuentes*, 19 I&N Dec. at 662. Since persecutors can have various motives for engaging in persecution, an asylum applicant does not need to establish "conclusively" that reasons for harm are motivated on account of a protected ground. *Matter of S-P-*, 21 I&N Dec. 486, 489 (BIA 1996). Instead, an applicant should provide direct or circumstantial evidence from which it is reasonable to infer that harm was done on account of a protected ground. *Id.* at 494. Furthermore, under the REAL ID Act, an applicant must show that the protected ground cannot play a minor role in the fear of persecution; but must be a central reason for persecuting the respondent. *Matter of J-B- & S-*, 24 I&N Dec. 208, 214 (BIA 2007) (stating that the protected ground cannot be "incidental, tangential, superficial, or subordinate to another reason for harm").

Although the respondent claims that the gang was motivated to target him based on his status as a male member of the [REDACTED] family, the motivation behind the gang's threats remains unclear, as the testimony and affidavits presented by the respondent and witnesses reveal various possible reasons as to why he was targeted.

First, according to the respondent's and witnesses' own testimonies and affidavits, [REDACTED] was targeted by the Mara 18 because he helped file a police report against them that led

to the arrest and incarceration of one of their members. The gang members' motive for killing [REDACTED] could be due to multiple factors, including the filing of a police report with his brother [REDACTED] his vowing to seek revenge on [REDACTED]'s behalf, and his general aggressive nature towards the gang. Furthermore, [REDACTED] had other personal confrontations with the Mara 18: he went to prison for the murder of his step-son "Chino," who was supposedly a boss in the gang, and he was openly hostile to gang members and tried to drive them off of his property and out of his store, where the gang members would visit to ask [REDACTED] for money. Ex. 22, Tab 16. As the respondent stated in his affidavit, "I think the Mara thought that my father might kill them because of his character/temper." *Id.* There are multiple reasons why the gangs could have targeted [REDACTED] not least because of individualized confrontations rather than his family membership.

Further, it is far from clear that the respondent's step-brother [REDACTED] was killed because the gang specifically targeted all male members of the [REDACTED] family. Other than the fact that [REDACTED] was killed by gang members, there was no evidence or details presented regarding the murder. The respondent merely claims that the Mara 18 knew that [REDACTED] was Agustin's son because they shared a physical resemblance, and they killed him for that reason. Ex. 22, Tab 16. However, the record lacks any evidence to support the respondent's theory. Nor does the respondent explain how the gangs identified [REDACTED] as Agustin's son, especially given the fact that [REDACTED] never lived with Agustin in Choloma. *Id.* In sum, there is no evidence supporting the respondent's contention that the murder was motivated by [REDACTED]'s membership as a male member of the [REDACTED] family.

While the respondent argues that "there is no doubt" that the Mara 18 targeted him specifically because he is a male member of the [REDACTED] family, the Court is unconvinced that this is the case. In support of his argument, the respondent points to testimony from his mother, stating that gang members specifically told her that the respondent was being targeted because he is Agustin's son. See Respondent's Post Hearing Brief, filed August 21, 2009, p8. Even where the possibility of a mixed motive exists, the respondent still cannot show that the gang's *central* motive was to target the respondent for being a [REDACTED]. *J-B- & S-*, 24 I&N Dec. at 214 (stating that the protected ground cannot be "incidental, tangential, superficial, or subordinate to another reason for harm"); see also *S-P-*, 21 I&N Dec. at 494 (stating that an applicant must provide direct or circumstantial evidence from which it is reasonable to infer that harm was done on account of a protected ground).

The respondent has not shown that his status as a [REDACTED] was one of the central reasons why the Mara 18 targeted him. The respondent's testimony indicates that the gangs directly threatened him on a few occasions. The respondent cited an incident in which a *paisa* named Abel fired two shots at the respondent. But as the respondent admitted in his affidavit, there was no indication of why Abel was shooting at the respondent. Ex. 22, Tab 16. The respondent's own testimony also suggests that the Mara 18 may have been motivated to threaten him by the fact that the respondent witnessed a murder committed by a gang member. According to the

respondent's testimony, the Mara 18 may also believe that the respondent was responsible for the death of one of its members, the young man who requested a ride from the respondent. In fact, the only indication that the gang was motivated to harm him due to his status as a male [REDACTED] was the gang member's comments to his mother. On other occasions, gang members appeared to threaten the respondent for other reasons: the fact that he witnessed a crime, the mistaken belief that he was involved in the death of another gang member.

The respondent argues in his brief that circumstantial evidence in the record supports the conclusion that the Mara 18 targeted the respondent due to his status as a male [REDACTED]. See Respondent's Post Hearing Brief, filed August 21, 2009, p8. In support of this argument, the respondent cites to documents in the record stating that gangs often target family members. However, other documents in the record indicate that gangs use violence against individuals for a multitude of reasons. The record states that gangs use violence and engage in terror campaigns for reasons ranging from turf control, market dominance, gang initiation, ascension into leadership positions, and discipline. Ex. 22, Tab 4. As the 2006 USAID Honduras profile recognized, "[f]or the most part, Honduran gangs exist to defend territory." Ex. 22, Tab 1. Sadly, the respondent may merely be targeted because his family resides in and owns a large property in Choloma, which the Mara 18 seeks to establish and maintain as its territory, as his mother testified has subsequently occurred since the family's departure from Honduras. Ex. 22, Tab 23.

Furthermore, although the respondent bases his fear of persecution on the belief that Mara 18 gang members target the family of their victims because they fear revenge, aside from generalized country report information, there is no indication that the Mara 18 believed this to be the case. The respondent never threatened the gang with revenge for the death of his father or on behalf of any other member of his family. His own family counseled him to leave the matter to God and the jurisprudence of the court. Ex. 22, Tab 12. In fact, the respondent left Honduras to come to the United States; a fact inconsistent with the respondent's assertion that the gang believes he plans to avenge his father's death. Furthermore, the respondent's theory that 'the Mara 18 will attack me because they fear I will attack them' is completely inconsistent with his past experiences and unlikely in the future if the respondent, a single individual, is confronted with the gang power he describes given their strength and his vulnerability.

Furthermore, the gang never physically harmed the respondent. The Seventh Circuit has left open the possibility that threats "of a most immediate or menacing nature" might, in some circumstances, constitute past persecution. See *Mitev v. INS*, 67 F.3d 1325, 1330-31 (7th Cir. 1995). However, in the majority of cases, threats in and of themselves will not compel a finding of past persecution. See *Bejko v. Gonzales*, 486 F.3d 482, 486 (7th Cir. 2006); *Boykov v. INS*, 109 F.3d 413, 416 (7th Cir. 1997). Unfulfilled and remote threats are generally insufficient to establish past persecution. See *Ahmed v. Gonzales*, 467 F.3d 669, 674 (7th Cir. 1997); *Boykov*, 109 F.3d at 416. The respondent's claim that the gang's actions rose to the level of past persecution on account of a protected ground is not supported by the facts in this case.

This Court recognizes that Honduras is a country plagued by gang violence. The threats, harassment, and crimes committed against the respondent's family are unfortunately a sad part of the general criminality and civil unrest perpetrated by gangs in Central America. "If this, without more, was sufficient to establish a [protected ground], then any victim once caught in the cross-hairs of a war-torn nation or a country rife with...violence would be eligible to seek immigration protection in this country on account of [a protected ground.] The immigration code, however, is not so broad in the relief it affords." *Aid v. Mukasey*, 535 F.3d 743, 748-49 (7th Cir. 2008). The respondent, ultimately, still has to establish that the Mara 18 knew of and pursued him on account of a protected ground, but he failed to do so in the present case. *See, e.g., Bolshakov v. INS*, 133 F.3d 1279, 1281 (9th Cir. 1998) (holding that the fact that petitioners had been victims of criminal activity in Russia was not a basis for asylum unless the perpetrators knew of and pursued them because of race, religion, nationality, membership in a particular social group, or political opinion).

c) Honduran Government Not Unable or Unwilling to Control Gangs

To be granted asylum, the harm that an applicant has endured or feared in his native country must not only stem from a protected ground under the Act but it must also have been inflicted by the government of his native country or by persons or an organization that the government is unwilling or unable to control. INA §101(a)(42); *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990). If the alleged persecutors are non-government actors, a respondent must show that the government perpetuated or condoned the persecution or demonstrated a complete helplessness to protect the respondent. *See Chakir v. Gonzales*, 466 F.3d 563, 570 (7th Cir. 2006); *Pramatarov v. Gonzales*, 454 F.3d 764, 766 (7th Cir. 2006); *Roman v. INS*, 233 F.3d 1027, 1034-35 (7th Cir. 2000); and *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000).

In order to show that the government of Honduras is unwilling or unable to control private acts of persecution, the respondent must show that the government 1) had knowledge of the persecution and refused to intervene or protect or 2) that the government condones, tolerates, or is complicit in the persecution and there is credible evidence that it would be futile or dangerous to seek government protection. *See Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998) (Ukrainian government unwilling to control anti-Semitic persecution where local police refused three times to investigate and country evidence credibly showed "local authorities have not taken action against those who foment ethnic hatred"); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (seeking Moroccan government protection from domestic abuse unproductive and potentially dangerous because judicial procedure is skewed against women, as even medical documentation is considered insufficient evidence of physical abuse, and women who do not prevail in court are returned to the abusive home); *see also Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (relocation not reasonable because police and government aware of persecution, would take no steps to stop it, had poor human rights record, and were assisting in persecution by searching for applicant).

The respondent failed to establish that the Honduran government is unable or unwilling to control the Mara 18. The respondent's own testimony shows that the legal system is effective in prosecuting gang members. Following the report that [REDACTED] and [REDACTED] filed against gang members for robbery and rape, the police were able to arrest and prosecute Moncho, who remains incarcerated to this day. Ex. 22, Tab 19. The respondent also acknowledged in his affidavit that around the time that his father was released from prison, the police had started cracking down on gang members. According to the respondent, partly because of this, the gang did not carry out its earlier threat to kill the respondent's father when he was released for the murder of "Chino." Ex. 22, Tab 16. Police also investigated the death of [REDACTED] and arrested a leading member of the Mara 18, who was successfully prosecuted and incarcerated on a fifteen year sentence. *Id.* When the respondent called the police fearing that the Mara 18 would come after him at his father's wake, the police dispatched a special anti-gang unit to protect the family for the day. *Id.* Because of the presence of the police, no gang members came into the house for the rest of the day. *Id.* While the Court recognizes that gang violence is an important social problem in Honduras, it also recognizes that the police are actively trying to arrest and control the gangs.

The country reports contained in the record demonstrate that Honduras is confronting a serious battle against gang violence. If anything, the police are often criticized for being too harsh in their crackdown. The country information acknowledges that the Honduran government has adopted a zero-tolerance policy against gang members, by arresting and detaining alleged gang members on charges of "illicit association." Ex. 25. In 2001, the government adopted the Law for the Prevention, Rehabilitation and Social Reintegration of gang members or Maras in 2001. Ex. 22, Tab 6. The program was structured in five units consisting of prevention, rehabilitation, reintegration, volunteers, and new projects, each of which is charged with developing programs and support in each of the five areas. *Id.* The state has also established the Permanent Commission for the Physical and Moral Protection of Children and a Special Unit for the Investigation of the Deaths of Minors. *Id.* The Honduran government is responding to the gang problem and is thus far from "providing protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct." *Hor v. Gonzalez*, 400 F.3d 482, 285 (7th Cir. 2005). This case is therefore distinct from those in which the police turned a blind eye to crimes and contributed to silencing the victim. *See, e.g., Galina*, 213 F.3d at 958 (where a series of attacks against the respondent's family were linked in connection to a government document and the respondent was kidnapped by uniformed men); *Hengan v. INS*, 79 F.3d 60, 63 (7th Cir. 1996) (local police and the Romanian Secret Service summoned the respondent for weekly questioning not about who may have been threatening her, but about whom she worked with in the political party); *Andriasian v. INS*, 180 F.3d 1033, 1042-43 (9th Cir. 1999) (while trying to report assault of his family to the police, respondent was advised by police "in a rather rude way" to leave Azerbaijan as soon as possible if he wanted to save their lives). While not always successful due to the great scope of the problem, the Honduran government is actively working toward ensuring the safety of its citizens from gang crimes by strictly enforcing the law, detaining and prosecuting perpetrators of gang violence, and luring young men away from gangs. The evidence in the record does not support the assertion that the government of Honduras is unable or unwilling to protect persons such as the respondent, but rather that it is utilizing its

limited resources in ways it deems most effective for confronting this serious problem of escalating gang violence.

In sum, the respondent has failed to establish that he was targeted by the Mara 18 gang on account of one of the protected grounds under the INA, and alternatively that these incidents were perpetrated by a group that the government is unable or unwilling to control.

3. Well-Founded Fear of Future Persecution

The respondent cannot establish a well-founded fear of future persecution, because as the analysis above concludes, the harm feared is not persecution on account of any of the five grounds specified in the Act. *INS v. Cardoza-Fonseca*, 400 U.S. 421, 400 (1987); *Mogharrabi*, 19 I&N Dec. at 400-41. As the respondent has not established past persecution and has not advanced an independent claim of a well-founded fear of future persecution, he does not meet the definition of a refugee.

As the Seventh Circuit has noted, "the hard truth [is] that unpleasant and even dangerous conditions do not necessarily rise to the level of persecution." *Mitev v. INS*, 67 F.3d 1325, 1331 (7th Cir. 1995). Just as "a threat posed by an armed insurgency is not 'persecution,'" the violence of criminal gangs is also not persecution, however much it affects the Honduran citizens who "would prefer to be far away from violent strife." *Hor*, 400 F.3d at 485-86. Asylum is not available if the applicant's claim is based on danger that affects a whole population in a "relatively undifferentiated way." *Ahmed v. Ashcroft*, 348 F.3d 611, 619 (7th Cir. 2003). These factors lead this court to conclude that the respondent has failed to meet his burden of demonstrating a well-founded fear of future persecution.

The respondent argues his case merits a grant of asylum on humanitarian grounds either because of the severity of the past persecution or because he will suffer other serious harm if he is returned to Honduras. See Respondent's Post Hearing Brief, filed August 21, 2009, p16. To qualify for such a discretionary grant of asylum, an alien who has established past persecution must either demonstrate "compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution" or establish "that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii)(A) & (B). Furthermore, as the Seventh Circuit case of *Kholyavskiy v. Mukasey* acknowledged, "typically, humanitarian asylum has been reserved for those who have endured torture, extended imprisonment or repeated physical abuse, usually at the hands of totalitarian regimes." *Kholyavskiy* 540 F.3d 555, 576 (7th Cir. 2008) (citations omitted). In *Kholyavskiy*, the Court determined that the harm suffered by Mr. Kholyavskiy (namely one incident where school children pulled down his pants and laughed at him for being circumcised and one incident where a girl used her dog to attack him) did not rise to the level of severity necessary for a grant of humanitarian asylum, even when taking into account his young age at the time, and his subsequent mental health issues. *Kholyavskiy*, 540 F.3d at 576. The Court did

suggest that there was a reasonable possibility that Mr. Kholyavskiy would suffer other serious harm if removed to Russia as he was highly dependant on medication to control the symptoms of his mental illness, incapable of functioning on his own due to his mental illness, and could be unable to obtain housing and medical treatment, especially given the fact that he could not obtain an internal residency permit in Russia. *Id.* at 577.

Here, the respondent has not proven that he suffered past persecution and is thus statutorily ineligible for a "humanitarian grant" of asylum based on the severity of past persecution. *See Mullai v. Ashcroft*, 385 F.3d 635, 638-39 (6th Cir. 2004) (holding that the applicant had not demonstrated past persecution and therefore was not eligible for a grant of asylum on humanitarian grounds). Additionally, the acts described by the respondent are not as severe as the level of harm typically associated with a grant of humanitarian asylum. *See, e.g., Bucur v. INS*, 109 F.3d 399, 405 (7th Cir.1997) (listing "German Jews, the victims of the Chinese 'Cultural Revolution' ... [and] survivors of the Cambodian genocide" as examples of individuals who may qualify for humanitarian asylum).

Furthermore, the respondent argues that the gang's threats pose a risk of serious harm to him if he returns to Honduras. However, the respondent's situation is much different than that faced by Mr. Kholyavskiy. First, the respondent is no longer a dependant minor, but a functional twenty-one-year-old adult. The respondent is independent enough to decide where it would be in his best interest to live in Honduras. This is different from the situation in *Kholavskiy*, as the applicant in that case required total dependence on medication and others to care for his needs. Second, although the respondent states that delinquency and the gang problem exist throughout Honduras, the respondent is confronted with members of a local gang, and has not seriously explored the possibility of relocating away from the conflict area, thereby mitigating his risk from the local gang by choosing a safer place to reside. The applicant in *Kholavskiy* was faced with the inability to obtain a "propiska", which would limit his ability to obtain housing country-wide. In this case, the respondent faces no such country-wide limitations.

B. Expert Witness

The Court does not find that Thomas Boerman qualified as an expert witness in this case. Ultimately, the immigration judge evaluates evidence to determine whether it is "probative, and its admission fundamentally fair." *Doumbia v. Gonzales*, 472 F.3d 957, 962 (7th Cir. 2007). While Dr. Boerman is certainly interested in the topic of gangs in Central America, he has no specialized education or training on the topic. Rather, Dr. Boerman holds a Ph.D. in special education. His research deals with general gang culture and intervention approaches, and it is not focused on Central American gangs. His doctoral dissertation was not on the topic of gangs in Central America or Honduras. Indeed, only one of his published articles focuses on this issue. While he teaches courses on delinquency and street drugs and related social policy, they are also

not specific to gangs in Central America or Honduras. In sum, there is no indication that any of his publications or courses, save for one recent article, dealt specifically with Central American gang issues. Furthermore, his personal visits to Honduras were limited and brief, comprised of only a two month stay in 2005 and five to six days in 2007. Given this record, the Court concludes that Dr. Boerman's testimony has limited probative value and that he is not an expert on gang issues in Honduras.

C. Withholding of Removal under Section 241(b)(3) of the INA and Relief under the Convention Against Torture

As the respondent's claim fails to meet the standard for asylum, it also fails to meet the more stringent showing required for withholding of removal under Section 241(b)(3) of the INA. See generally *Cardoza-Fonseca*, 480 U.S. 421; and 8 C.F.R. § 1208.16(c)(2). Section 241(b)(3) of the INA provides that an individual may not be removed to a country where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. To be entitled to withholding under Section 241(b)(3) of the INA, the respondent must demonstrate a "clear probability" that such persecution will occur in the country of removal, i.e., that it is "more likely than not." *INS v. Stevic*, 467 U.S. 407 (1984) (withholding under former Section 243(h) of the INA); see also 8 C.F.R. § 1208.16(b). This burden of proof is higher than that required for asylum. See *Cardoza-Fonseca*, 480 U.S. at 421. As the respondent's claim fails to meet the standard for asylum, it also fails to meet the more stringent showing required for withholding of removal under Section 241(b)(3) of the INA. See generally *id.*

The respondent has also failed to meet his burden to show any independent basis for relief under the Convention Against Torture. See Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) (entered into force June 26, 1987; for the United States, April 18, 1988); Pub. L. 105-277 (1998). An applicant for withholding of removal under the Convention Against Torture bears the burden of proving that it is "more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2); see also *Matter of M-B-A-*, 23 I&N Dec. 474, 477-78 (BIA 2002). There is no corroborative evidence that the respondent would be singled out for torture, nor that the act would be "intentionally inflicted...by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim." 8 C.F.R. § 208.18(a); *Matter of J-E-*, 23 I&N Dec. 291, 297-99 (BIA 2002). Without evidence of an individualized risk of torture, the Court cannot find that it is more likely than not that the respondent will be tortured upon his return. Moreover, the respondent did not even make a request for protection under the torture convention in his brief, much less establish that he qualifies for it. Therefore, his application for relief under the Convention Against Torture will also be denied.

D. Voluntary Departure

Section 240B of the INA permits the Attorney General to grant a non-citizen the privilege of voluntary departure at the conclusion of proceedings, if the respondent can establish that: (1) he or she has been physically present in the United States for a period of at least one year immediately preceding the date the NTA was served; (2) he or she has been a person of good moral character during the five-year period immediately preceding the application for relief; (3) he or she is not removable under section 237(a)(2)(A)(iii) or 237(a)(4)(B) of the INA; (4) he or she has the means to depart the United States voluntarily and intends to do so; and (5) he or she merits the relief as a matter of discretion. *See* INA § 240B(b), 8 U.S.C. § 1229c(b). The respondent has not made a request for voluntary departure, nor is he eligible to depart voluntarily, as he was detained by the government the same day he entered the United States, and thus, did not accrue the 365 days of physical presence prior to the issuance of the NTA.

V. CONCLUSION

The Court finds that the respondent has not established persecution on account of his membership in a particular social group. The Court also finds, in the alternative, that the respondent has not met his burden of proof to establish that the Honduran government is unwilling or unable to control the Mara 18. Finally, as the respondent has not advanced an independent claim of a well-founded fear of future persecution, the Court finds that the respondent cannot show a well-founded fear of future persecution. The respondent has therefore failed to establish eligibility for asylum, withholding of removal under section 241(b)(3) of the INA, or relief under the Convention Against Torture.

Accordingly, the following orders will be entered:

ORDER OF THE IMMIGRATION JUDGE


IT IS HEREBY ORDERED that the respondent's request for asylum be **DENIED**.

IT IS FURTHER ORDERED that the respondent's request for withholding of removal under section 241(b)(3) of the Act be **DENIED**.

IT IS FURTHER ORDERED that the respondent's request for withholding of removal under the Convention Against Torture be **DENIED**.

IT IS FURTHER ORDERED that voluntary departure be **DENIED**.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Honduras on the charge contained in the Notice to Appear.


CRAIG M. ZERBE
IMMIGRATION JUDGE