

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294

The Law Office of Christina Brown
Brown, Christina
P.O. Box 100909
Denver, CO 80250

In the matter of

File A

DATE: Mar 13, 2023

Unable to forward - No address provided.

XX Attached is a copy of the decision of the Immigration Judge. This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision. See the enclosed forms and instructions for properly preparing your appeal. Your notice of appeal, attached documents, and fee or fee waiver request must be mailed to:

Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Attached is a copy of the decision of the immigration judge as the result of your Failure to Appear at your scheduled deportation or removal hearing. This decision is final unless a Motion to Reopen is filed in accordance with Section 242b(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:

IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294

Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.

Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.

Other: _____

D. DeHerrera
COURT CLERK
IMMIGRATION COURT

FF

cc: GOLEM, LAUREN
12445 E CALEY AVE
CENTENNIAL, CO, 80111

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DENVER, CO**

In the Matter of:

[REDACTED]

Respondent

[REDACTED]

Date: March 13, 2023

In Removal Proceedings

Charges:

Section 212(a)(7)(i)(I) of the Immigration and Nationality Act (“INA” or “Act”), as amended, in that the respondent who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, re-entry permit, border crossing cards, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

Section 212(a)(6)(A)(i) of the Act, as amended, in that the respondent is an 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:

Asylum pursuant to INA § 208; Withholding of Removal pursuant to INA § 241(b)(3); Relief under the United Nations Convention Against Torture (CAT), 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18.

On Behalf of the Respondent:

Christina Brown, Esquire
The Law Office of Christina Brown
P.O. Box 100909
Denver, CO 80250

On Behalf of DHS:

Lauren Golem, Assistant Chief Counsel
Office of the Chief Counsel
U.S. Department of Homeland Security
12445 East Caley Avenue
Centennial, Colorado 80111

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The respondent is a twenty-two-year-old native and citizen of Guatemala. On or about

August 1, 2018, he entered the United States with his father, Jose [REDACTED], who is also a native and citizen of Guatemala, at or near Calexico, California.¹ He was placed into removal proceedings through the filing of a Notice to Appeal (NTA) with the court on September 11, 2018. Exh. 1. Through counsel, the respondent admitted the factual allegations in the NTA and conceded the charges of removability under sections 212(a)(7)(i)(I) and 212(a)(6)(A)(i) of the Act. Based on the admissions and concessions, the Court found the respondent inadmissible and designated Guatemala as the country of removal. The respondent filed a Form I-589, Application for Asylum and for Withholding of Removal, on April 25, 2019. Exh. 5. The respondent also requested protection under the CAT.

For the reasons set forth below, the Court grants the respondent's application for asylum under section 208 of the Act.²

II. EVIDENCE PRESENTED

The Court has considered all evidence in the record, even if not explicitly mentioned in this decision. The Court will reference the evidence most relevant to its analysis below. The evidence of record consists of the respondent's testimony and the following admitted exhibits:

- Exhibit 1: Form I-862, Notice to Appear, filed September 11, 2018;
- Exhibit 2: Form EOIR-18, Record of Proceedings, Credible Fear Review;
- Exhibit 3: Form I-870, Record of Determination/Credible Fear Worksheet, dated August 9, 2018;
- Exhibit 4: Form I-867A, Record of Sworn Statement in Proceeding under INA § 235(b)(1), dated August 1, 2018;
- Exhibit 5: Form I-589, Application for Asylum and for Withholding of Removal, filed April 25, 2019;
- Exhibit 6: The Respondent's Evidentiary Submission, filed November 9, 2022.

III. FINDINGS OF FACT AND ANALYSIS

The respondent is a twenty-two-year-old indigenous Mayan, who was born in Jacaltenango, Huehuetenango, Guatemala. He applied for asylum, asserting that he was persecuted and fears future persecution on account of his race and membership in the particular social groups (PSGs) of "indigenous Guatemalans" and "immediate family of Jose [REDACTED]."³

¹ The case of the respondent's father has been bifurcated.

² Because the Court grants the respondent relief under section 208 of the Act, it declines to analyze his application for withholding of removal under section 241(b), and protection under the Convention against Torture.

³ After closing the evidentiary portion of the hearing, the respondent, through counsel, effectively withdrew his PSG "immediate family of Jose [REDACTED]." As the Court grants asylum based on persecution on account of his race, the Court will not address the issues regarding persecution on account of his membership in either PSG. See *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam) ("As a general rule courts and agencies are not required to make findings on



A. Credibility

An applicant has the burden of proof to establish he is eligible for relief, which he may demonstrate through credible testimony. *See* INA § 240(c)(4). Considering the totality of the circumstances, the Court may base its assessment of the applicant's credibility on his demeanor, candor, or responsiveness, the plausibility of his account, the consistency between his statements and other evidence of record, inaccuracies, falsehoods, or any other relevant factor. INA § 240(c)(4)(C).

The Court finds that the respondent is credible. His testimony was consistent and conformed to the information provided in his applications for relief and other documentary evidence of record. The Court also had an opportunity to observe his demeanor and other nonverbal indicators, and his testimony appeared authentic and genuinely based in fact. The DHS did not raise credibility as an issue in this case.

B. Asylum

Asylum is a discretionary form of relief available to noncitizens physically present or arriving in the United States, in accordance with sections 208 or 235(b) of the Act. INA § 208(a)(1); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 443–44 (1987). An applicant is eligible for asylum under INA § 208 if: (1) his application was timely filed within one year of his last arrival in the United States; (2) he is not statutorily barred from relief; (3) he is a refugee within the meaning of INA § 101(a)(42)(A); and (4) he merits asylum in the exercise of discretion.⁴ *See* INA § 208(a)(2)(B), (b)(1)(A), (b)(2).

An asylum applicant bears the burden of proving that he is a “refugee” as defined in section 101(a)(42) of the Act. INA § 208(b)(1); 8 C.F.R. § 1208.13(a); *Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997). This requires the applicant to prove that he is outside his country of nationality and is unable or unwilling to return to or avail himself of that country's protection because he has suffered past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a PSG, or political opinion. INA § 101(a)(42); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230 (BIA 2014).

1. *Past Persecution*

i. *Harm Rising to the Level of Persecution*

Persecution is a threat to life or freedom or the infliction of suffering or harm upon those who differ in a way that is regarded as offensive. *Woldemeskel v. INS*, 257 F.3d 1185, 1188 (10th Cir. 2001); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). For such acts to rise to the level

issues the decision of which is unnecessary to the results they reach.”); *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (recognizing that IJs are not required to make findings on issues that are unnecessary to result reached).

⁴ The respondent entered the United States on August 1, 2018. Exh. 1. He filed his application for asylum on April 25, 2019; accordingly, his application is timely. Exh. 5. No statutory bars have been raised in this case.

[REDACTED]

of persecution, they must be “more than just restrictions or threats to life and liberty.” *Woldemeskel*, 257 F.3d at 1188; *see also Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008). In determining whether an applicant has shown harm rising to the level of persecution, the Court considers incidents in the aggregate. *See Hayrapetyan*, 534 F.3d at 1337–38; *see also Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998).

Here, the respondent testified that he and his family lived in extreme poverty in his village in Jacaltenango. His family consisted of the respondent’s parents, four siblings, and grandmother. They lived in a one-bedroom adobe house, which was a day and a half walk to a well for the nearest water.

The respondent’s family are farmers, or harvesters. They work the land owned by a friend of the respondent’s father. The respondent and his family were not paid but worked ten to eleven hours a day to grow their own sustenance. As payment to work the land, they provided the owner a quarter or half of their harvest. The harvest was insufficient for the family, as a result, at times the family only ate beans, plants, or salted tortillas. The respondent and his father worked for other farmers but usually only earned about \$7 a day, one to two days a week, limited by the season. The respondent, as a minor, was skinny and weak due to extreme malnutrition.

The respondent attended three years of school, until his family could no longer afford to send him. At school, the respondent and his cousin, who were the only Mayans from his village, were bullied because of his clothes; he only had one uniform for the year. He also believes he was bullied because of his accent in Spanish, his non-native language. The other students came from the city and did not have “accents.” The bullying included other students hitting the respondent and his cousin on the head.

During his school years, the respondent suffered an infection to his leg that caused him pain and fever for approximately one year. The respondent could not afford modern medical treatment, and his local clinic was unwilling to treat him because his family could not afford to pay. Despite his illness, the respondent still had to work long hours harvesting, because the family would have starved if he had not. The respondent eventually sought treatment from a natural healer, who was able to relieve some of the pain and fever symptoms, and he eventually recovered.

The respondent and his family did not receive any government services or benefits. In fact, the only local government benefit available was the disbursement of fertilizer during election time; however, the respondent’s family was deliberately denied this benefit because it was explicitly tied to support of a political candidate.

The respondent stated that he would not be able to get a job anywhere in Guatemala because he is indigenous, and he is easily identifiable by his accent and clothes. Even if he were to gain employment, he claims he will be paid less because he is indigenous.

Persecution may take both physical and non-physical forms, including economic. *See* H.R. Rep. No. 95-1452 (“The harm or suffering need not [only] be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”). In *Vicente-Elias v. Mukasey*, the 10th

Circuit approvingly reviewed the Board of Immigration Appeals' (the Board) two-prong test for determining economic persecution from *Matter of T-Z*. 532 F.3d at 1086. The Tenth Circuit affirmed the use of two distinct tests for evaluating economic hardship, stating:

In some situations, the focus is on whether conditions for a [noncitizen] have been or will be so impoverished as to support a finding of persecution, and *Acosta's* 'threat to life or freedom' test naturally applies; in other situations, the focus is on whether a [noncitizen] has been or will be subjected to an economic loss that, though sparing the bare essentials of life, nevertheless supports a finding of persecution, and *Kovac's* 'imposition of severe economic disadvantage' test is appropriate.

Vicente-Elias v. Mukasey, 532 F.3d 1086, 1089 (10th Cir. 2008) (citing *Matter of T-Z*, 24 I&N Dec. 163, 173–74 (BIA 2007)). The Court should use the "*Acosta* test . . . [when a case] involve[s] general economic disadvantage but no seizure or loss of property, assets, or professional occupation/status that would implicate the *Kovac* test," as is the case here. *Vicente-Elias*, 532 F.3d at 1090. The 10th Circuit noted that these are alternative, not mutually exclusive grounds, and that the second test was appropriate in cases where there are "extraordinarily severe fines or wholesale seizure of assets," while the first test was for situations where "conditions for a [noncitizen] have been or will be so impoverished as to support a finding of persecution." *Vicente-Elias*, 532 F.3d at 1089.

Using the *Acosta* test, the Tenth Circuit upheld the Immigration Judge's (IJ) finding that two indigenous men from Guatemala had not established economic persecution, although they had suffered extreme poverty.⁵ In the more serious case, the respondent had demonstrated that his employment opportunities were minimal due to his inability to speak Spanish, and that he had limited opportunity to learn Spanish because the schools were not free. He also testified that he was able to find some work with a labor recruiter cleaning up and cultivating land on the coast, and that his family cultivated crops and raised livestock. *Id.* at 1090. Although the IJ noted the income disparity and racial discrimination directed at the respondent, it found that the discrimination and deprivation did not rise to the level of persecution. *Id.* at 1091. In particular, the IJ noted that the lives of the respondent and others in their community were not threatened and that they did not face a loss of freedom due to their economic circumstances. They further noted that paying work was available and the community was able to survive on a subsistence level through cultivating crops, animal husbandry, and an exchange economy. *Id.* at 1092.

Here, using the second *Acosta* test, the Court finds the respondent's case to be distinguishable from *Vicente-Elias*. While the respondent's father was able to find some work and

⁵ *Id.* at 1091 ("While we review the IJ's legal conclusion de novo, we review matters of fact using a deferential substantial-evidence standard under which the IJ's findings are conclusive unless any reasonable adjudicator would be compelled to conclude the contrary. In this circuit, the ultimate determination whether an alien has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution.") (internal quotations and citations omitted). The Court notes that while the Tenth Circuit upheld this decision, it did it under an "any reasonable adjudicator" deferential standard. It did not find that the facts in that case compelled the Court to find that there was no past persecution or a well founded fear of future persecution.

grow some crops, his circumstances were considerably more dire than the respondents' in *Vicente-Elias*, to the point that the economic deprivation and restrictions were so severe that they constituted a threat to the respondent's life and freedom. The Court considers significant the fact that the respondent was a child while in Guatemala. *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004) (“[A]ge can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted or whether she holds a well-founded fear of future persecution”); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) (remanding a finding of no past persecution of a seven-year-old to the Board, and instructing the Board and the Immigration Judge to consider the “harms [the asylum applicant] and his family incurred cumulatively and from the perspective of a small child.”).⁶ The former Immigration and Naturalization Service’s *Guidelines for Children’s Asylum Claims* advises that “harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution,” citing *Guidelines for Children’s Asylum Claims, INS Policy and Procedural Memorandum from Jack Weiss, Acting Director, Office of International Affairs to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Asylum and Refugees)* 14, (Dec. 10, 1998). The economic persecution that the respondent has suffered more substantially affected him as a growing child than the record demonstrated for the two adult respondents in *Vicente-Elias*. The effects of extreme poverty affect physical and mental growth, resulting in developmental delays for indigenous Guatemalan children, which is different than how the poverty would affect an adult.

Moreover, the respondent’s father was only able to find some paid work, one or two days a week, for \$7 a day, and this work was limited to the harvesting season. This was not enough to sustain the family. Unlike the respondents in *Vicente-Elias*, the respondent’s family here was not able to rely on subsistence farming and an exchange community to meet their basic needs. The respondent’s family had to provide one quarter to one half of their harvest to the owner of the land they cultivated. The respondent testified that they were sometimes unable to grow enough food for the family and there are periods that they did not have enough food, even with the subsistence farming and the family’s limited income. The respondent had to walk a day and a half for water. He could not afford to attend school and, as a child, was forced to work long days while suffering a severe infection in order to survive. The respondent had no access to modern medicine and was weak and malnourished.

Thus, the Court finds that that the economic deprivation and restrictions the respondent suffered in Guatemala were so severe that they constitute a threat to the respondent’s life and freedom. Therefore, the Court finds that the respondent suffered harm rising to the level of persecution. *Acosta*, 19 I&N Dec. at 222.

ii. On Account of a Protected Ground

The respondent claims that he suffered past persecution on account of his race and membership in two PSGs. The Court examines the persecutors’ motives and will find a nexus if

⁶ This case arises under the jurisdiction of the Tenth Circuit Court of Appeals. The Court is bound by decisions of the United States Supreme Court, decisions of the Tenth Circuit Court of Appeals, precedent decision of the Attorney General and the Board, and regulations promulgated by the Attorney General of the United States. To the extent that the Court cites other authorities, the Court recognizes that they are not controlling precedent in this case. Rather, to the extent that such cases are cited, they are cited as the Court’s independent reasoning in this case.

[REDACTED]

a protected ground is “at least one central reason” for his persecution. INA § 208(b)(1)(B)(i); *see also Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211–12 (BIA 2007). The protected ground cannot play a minor role in the persecution, nor can it be “incidental, tangential, superficial, or subordinate to another reason for harm.” *Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013) (citations omitted). The persecutor’s motive for inflicting harm upon the respondent is a question of fact to be determined in light of the circumstances surrounding the harm. *See Matter of W-G-R-*, 26 I&N Dec. 208, 223 (BIA 2014); *see also Elias-Zacarias*, 502 U.S. at 483. A persecutory motive is one in which an individual seeks to overcome a protected characteristic of a victim. *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

The respondent seeks protection based primarily upon his race and ethnic identity as an indigenous Mayan in Guatemala. The respondent’s indigenous heritage or ethnicity is a protected characteristic, since ethnicity “falls somewhere between and within the protected grounds of race and nationality.” *Shoaf v. INS*, 228 F.3d 1070, 1074 n.2 (9th Cir. 2000) (internal quotation marks omitted). Furthermore, United States Citizenship and Immigration Services (USCIS) training materials define “nationality” to include “membership in an ethnic or linguistic group” and explain that “nationality may also overlap with harm on account of race and/or religion.” USCIS, *Lesson Plan Overview: Asylum Officer Basic Training Course* (2009). As such, the respondent’s indigenous ethnicity serves as a protected ground.

The Court finds that the respondent’s ethnicity is one central reason for his persecution. The respondent testified he lived in a small, rural village made up exclusively of indigenous people. He stated that there was very little work there and there were no government services. Even knowing the extreme poverty facing inhabitants of his village, the government did not provide any kind of welfare or food subsidies, apart from fertilizer during election time (which was not provided to improve the lives of the residents; rather, it was used as a political tool). The respondent’s family did not receive even this small benefit.

His testimony on the reason for the persecution is supported by the country condition evidence. Indigenous World 2022 notes the following impact of the inequality and discrimination faced by Mayan people in Guatemala:

Indigenous Peoples continue to lag behind in Guatemalan society as a whole in terms of health, education, employment and income Structural racism lies at the root of this inequality, social exclusion, and violations of the fundamental rights of Indigenous Peoples. Although the Political Constitution of the Republic of Guatemala recognizes the existence of Indigenous Peoples, calls itself a multicultural society, and has ratified international agreements on the rights of Indigenous Peoples, in practice the social, economic and political gap between Indigenous Peoples and the non-indigenous population remains wide. The State invests USD 0.4 per day in each Indigenous person, for example, but USD 0.9 per day in each non-indigenous person; poverty affects 75% of Indigenous people and 36% of non-indigenous people; chronic malnutrition affects 58% of Indigenous people compared to 38% of non-indigenous people. As for political participation, Indigenous people account for no more than 15% of parliamentarians or high-ranking public officials.

Ex. 6 at 30-31. These numbers are even more startling when taking into account the fact that indigenous people make up approximately 60% of the Guatemalan population. *Id.* at 36. Further,

Guatemala is a middle-income country with a long history of social exclusion, which is quantitatively and qualitatively extensive and structurally ingrained. Social exclusion reflects the main dividing lines in Guatemalan society, between mestizos and indigenous people as well as between urban and rural settings. The small, rich, urban white and Ladino elites control most of the resources, while the majority of the indigenous rural population lives below the poverty line. The INE also reports that 79% of the indigenous population lives in poverty and 40% of them lives in extreme poverty. Indigenous populations suffer from discrimination and exclusion, which makes it very difficult for them to evade poverty.

Id. at 73 (Bertelsmann Stiftung, BTI 2022 Country Report – Guatemala. Guerslaoh: Bertelsmann Stiftung, 2022). Similarly, Freedom House, *Freedom in the World 2022 Guatemala*, reports that in Guatemala, “Indigenous communities suffer from high rates of poverty, illiteracy, and infant mortality.” Exh. 6 at 49.

The United Nations Special Rapporteur on the Rights of Indigenous Peoples noted in the report from her 2018 visit to Guatemala: “Patterns of violence and repression also persist, particularly in the indigenous territories, thus keeping alive the legacy of violence and genocide dating from the time of the international armed conflict of 1960 to 1996.” *Id.* at 115. She goes on to note:

The main structural problem affecting the Maya, Xinka and Garifuna peoples of Guatemala is all-pervasive racism and discrimination, which amount to de facto racial segregation and impinge on all areas of life. A previous Special Rapporteur, Mr. Stavenhagen, highlighted four interrelated forms of discrimination that were present in the country: legal interpersonal, institutional and structural. Fifteen years after his visit, the Special Rapporteur could see that, sadly, this situation persists. The indigenous peoples face structural racism in their daily lives, as evidenced in the failure to protect their lands, territories and natural resources and their difficulties in obtaining access to education, formal employment, health care, political participation and justice.

Id.

Based on the foregoing, the Court finds that the extreme poverty and resulting malnutrition that the respondent suffered in Guatemala was on account of structural racism in Guatemalan society. Further, the that the respondent was unable to access modern health care when he faced a serious, year-long infection as a child was on account of his ethnicity. “The majority of the indigenous population does not have access to primary health care. State investment in health services is among the lowest in Latin America. The Special Rapporteur [on the rights of indigenous peoples] was able to observe the lack of facilities, personnel and medicine in the territories that she visited.” *Id.* at 130. The respondent’s inability to attend more than three years of school was also on account of his indigenous status. “Indigenous children continue to have very restricted access to education. Half of indigenous children do not go to school . . . In additional to the failure to implement proper bilingual education, conditions in the education service are abysmal,

including overcrowded classrooms, poor-quality teaching, dilapidated facilities, and racism and discrimination in the education system. The Special Rapporteur was repeatedly informed of school fees that forced indigenous children to leave school and led to a rise in the overall dropout rate.” *Id.* Country condition reports confirm that child labor, as in this case, is a widespread issue within Guatemala, mostly occurring in rural, indigenous areas of extreme poverty. The Department of State reports, “Most child labor occurred in rural indigenous areas of extreme poverty. The informal and agricultural sectors regularly employed children younger than 14, usually in small family enterprises, including in the production of broccoli, coffee, corn, fireworks, gravel, and sugar.” *Id.* at 209.

Based on the country condition evidence and the respondent’s testimony, the Court finds that the respondent has met his burden to establish that his indigenous heritage is one central reason for his persecution.

iii. *Unable to Return to or Avail Himself of that Country’s Protection*

The Court finds that the respondent cannot return to, nor avail himself of Guatemala’s protection. First, the respondent testified that the government provided fertilizer to people in his community on at least one occasion, but only in exchange for their political support. This evidences an awareness of the plight of the community and ability to provide relief, but the refusal to do so unless for political gain. Moreover, the State Department of State notes:

Indigenous communities were underrepresented in national politics and remained largely outside the political, economic, social, and cultural mainstream. This was mainly due to limited educational opportunities (contrary to law), limited communication regarding their rights, and pervasive discrimination. Government agencies dedicated to supporting indigenous rights lacked political support. These factors contributed to disproportionate poverty and malnutrition among most indigenous populations.

Exh. 6 at 197. The U.N. Special Rapporteur reports that, “According to official estimates, public expenditure for indigenous people is less than half of that for the rest of the population. This indicates profound institutional discrimination.” *Id.* at 129. The Department of State reports that “the executive branch lacked a coordinated approach to address poverty and unemployment concentrated mainly in indigenous and Afrodescendant communities, although there were some government programs directed at the needs of these populations.” *Id.* at 195. As noted earlier, Guatemala “invests USD 0.4 per day in each Indigenous person, for example, but USD 0.9 per day in each non-indigenous person; poverty affects 75% of Indigenous people and 36% of non-indigenous people.” *Id.* at 31; *id.* at 120 (noting that Guatemala has set up thirty-four public institutions with “indigenous windows,” but has “allocated only 0.12% of its national budget to such efforts A number of them operate on an inadequate legal basis, which leaves them dependent on the goodwill of whatever government is in power, with little political weight and a shortage of staff and funding. After two decades of existence, it is worth asking whether the existence of so-called indigenous institutions is not perpetuating the segregation of indigenous issues in State activity and the tendency to see them as marginal.”).

Guatemala struggles with high levels of poverty generally. What distinguishes this case is the pervasive discrimination that is inherent to the Guatemalan government, which leaves the indigenous population in general at approximately twice the level of poverty that is faced by non-indigenous populations. For the respondent, this resulted in life threatening conditions of malnutrition and infection, conditions that the Guatemalan government has proven itself unwilling to rectify because of this pervasive discrimination. Therefore, based on the foregoing, the Court finds that the respondent could not avail himself of Guatemala's protection.


In summary, the Court finds that the testimony regarding the respondent's living conditions in Guatemala, supported by ample country condition evidence, demonstrates that as an indigenous Guatemalan, the respondent lived in extreme poverty such that it constituted a threat to his life and freedom. The harm he suffered was on account of his Mayan ethnicity and the respondent could not avail himself of Guatemala's protection. This is bolstered by the fact that the respondent was a child. Therefore, the Court finds that the respondent has met his burden to demonstrate that he has suffered past persecution.

2. *Well-Founded Fear of Future Persecution*

i. *Presumption of a Well-Founded Fear*

Because the respondent established that he suffered past persecution, he is presumed to have a well-founded fear of future persecution on the same grounds. 8 C.F.R. § 1208.13(b)(1). DHS may rebut this presumption by demonstrating either that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in his home country, or that the applicant could relocate to another part of the country to avoid future harm, and it would be reasonable to expect him to do so. 8 C.F.R. §§ 1208.13(b)(1)(i)(A)–(B); *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 31 (BIA 2012). DHS bears the burden of rebutting this presumption by a preponderance of the evidence. 8 C.F.R. § 1208.13(b)(3)(ii); *Matter of D-I-M-*, 24 I&N Dec. 448, 450 (BIA 2008).

The DHS has not demonstrated that country conditions have changed such that the respondent no longer has a well-founded fear of future persecution. The Court acknowledges that it considered that the respondent was a child when he suffered past persecution; however, the fact that the respondent is now an adult does not negate the past persecution, nor does it change the presumption of a well-founded fear of future persecution as an adult. The respondent has submitted evidence that demonstrates that although he is now an adult, conditions have actually worsened in Guatemala for indigenous people than when he was a child. As noted by the U.N. Special Rapporteur, "indicators show an increase in poverty among indigenous people, alongside a rise in inequality and the hoarding of land." Ex. 6 at 120. The Special Rapporteur further stated that she "wished to express her concern at the massive escalation in the violation of indigenous peoples' rights that is occurring against the backdrop" of "mining, energy, infrastructure, conservation, and other activities that affect indigenous lands, territories, and resources." *Id.* at 121-22. She goes on to note, "Guatemala is faced with an alarming intensification of violence, which is shown in the increase in the number of murders of indigenous defenders who attempt to defend their rights over their traditional lands." *Id.* at 125. Given this backdrop, the Court finds that even though the respondent is now an adult, the government has not rebutted the presumption that he has a well founded fear of future persecution in Guatemala.



The DHS has also not shown that the respondent could move to another part Guatemala to avoid the harm. As country condition evidence shows, persecution and discrimination of indigenous individuals in Guatemala is pervasive and country wide. *See, generally*, Ex. 6. The respondent would face discrimination based on his accent and manner of dress, making it unreasonable for him to be forced to relocate to another part of the country. Further, there are high levels of gang-based violence throughout the country, making it dangerous for anyone to relocate, and particularly an indigenous person. Ex. 6 at 168 (US State Department Human Rights Report on Guatemala).


Accordingly, the Court finds that the respondent suffered past persecution and the government has not met its burden to establish that there are changed country conditions or the respondent could internally relocate within Guatemala such that he no longer has a well founded fear.

ii. *Pattern and Practice*

In the alternative, in well-founded fear cases, the applicant need not establish that he will be “singled out” individually for persecution if he can show that there is a “pattern or practice” of persecuting others similarly situated to the applicant in his country and that the applicant “is included in, or identified with, the persecuted group.” 8 C.F.R. §§ 208.13(b)(2)(iii)(A)–(B); 8 C.F.R. §§ 1208.16(b)(2)(i)–(ii); *Woldemeskel*, 257 F.3d at 1190; *Matter of A-M-*, 23 I&N Dec. 737, 740 (BIA 2005). Persecution must be systemic or pervasive. *Woldemeskel*, 257 F.3d at 1190. The Court may consider evidence of pervasive persecution, regardless of whether a pattern or practice claim is made. *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987) (stating that where the country at issue has a history of persecuting people in circumstances similar to those of the asylum-seeker, careful consideration should be given to that fact).

Here, the respondent submitted a wealth of background materials to support his argument that there is pervasive and systematic economic persecution against indigenous individuals, like the respondent, in Guatemala. The Indigenous World 2022 reports that:

Indigenous Peoples continue to lag behind Guatemalan society as a whole in terms of health, education, employment and income, a situation that is even worse for Indigenous women. Structural racism lies at the root of this inequality, social exclusion, and violations of the fundamental rights of Indigenous Peoples. Although the Political Constitution of the Republic of Guatemala recognizes the existence of Indigenous Peoples, calls itself a multicultural society and has ratified international agreements on the rights of Indigenous Peoples, in practice the social, economic, and political gap between Indigenous Peoples and the non-indigenous population remains wide. The State invests USD 0.4 per day in each Indigenous person, for example, but USD 0.9 per day in each non-indigenous person; poverty affects 75% of Indigenous people and 36% of non-indigenous people; chronic malnutrition affects 58% of



Indigenous people compared to 38% of non-indigenous people. As for political participation, Indigenous people account for no more than 15% of parliamentarians or high-ranking public officials.

Exh. 6 at 30–31. The U.N. Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala stated:

[T]he situation of the Maya, Xinka and Garifuna peoples is characterized by serious structural problems, particularly the lack of protection for their rights to their lands, territories and resources and the racial discrimination that pervades all areas of life. [The Special Rapporteur] expresses her deep concern at the resurgence of violence, forced evictions and the criminalization of indigenous peoples that defend their rights. Impunity, corruption, institutional weakness, the failure to implement the Peace Agreements and extreme economic and social inequality are the main obstacles.

Id. at 115. The report continues,

Approximately 80 percent of indigenous people live in poverty, whereas, according to the National Standard of Living Survey for 2014, the poverty rate among the non-indigenous population is 46 per cent. About 40 per cent of indigenous people live in extreme poverty and more than half of indigenous children suffer from chronic malnutrition. This is a problem of alarming proportions for the country.

Id. at 129. “Almost 70 percent of the indigenous population work in the informal sector and only 10 percent of the persons in receipt of social security are indigenous. The situation of indigenous workers is extremely serious, with the persistence of such practices as labour tenancy.” *Id.* at 129.

Similar to the respondent’s own experience with the educational system in indigenous areas of Guatemala, the U.N. Special Rapporteur reports:

In addition to the failure to implement proper intercultural bilingual education, conditions in the education service are abysmal, including overcrowded classrooms, poor-quality teaching, dilapidated facilities and racism and discrimination in the education system. The Special Rapporteur was repeatedly informed of school fees that forced indigenous children to leave school and led to a rise in the overall dropout rate.

Id. at 130.

As the respondent has also demonstrated in his own experience, “The majority of the indigenous population does not have access to primary health care. State investment in health

services is among the lowest in Latin America. The Special Rapporteur was able to observe the lack of facilities, personnel and medicine in the territories that she visited.” *Id.* at 130. The Department of State similarly reports: “Discrimination against indigenous cultures and customs existed in the health-care system.” *Id.* at 197.

Based on the respondent’s testimony and the overwhelming objective documentary evidence regarding country conditions in Guatemala, the Court also finds there is a pattern and practice of economic persecution against those similarly situated to the respondent in Guatemala. 8 C.F.R. §§ 208.13(b)(2)(iii)(A)–(B); 8 C.F.R. §§ 1208.16(b)(2)(i)–(ii). Accordingly, the respondent has demonstrated an independent well-founded fear of persecution.

IV. CONCLUSION

As the respondent has established that he suffered past persecution in Guatemala on account of his race, and the DHS has failed to rebut the presumption of a well-founded fear of future persecution, the respondent has established that he meets the definition of a refugee. In the alternative, the respondent has demonstrated a pattern and practice of economic persecution that is systemic and pervasive against the indigenous population of Guatemala. Further, the respondent has no known criminal history nor have adverse factors been presented in this case. Accordingly, the Court finds that the respondent has established that he merits a favorable exercise of discretion. Therefore, the Court grants his application for asylum.

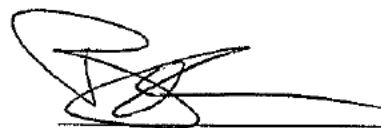
Accordingly, the Court enters the following orders:

ORDERS

IT IS HEREBY ORDERED that the respondent’s application for asylum pursuant to section 208 of the Act is **GRANTED**.

IT IS FURTHER ORDERED that appeal be **RESERVED** by both parties.

March 13, 2023
Date



Brea C. Burgie
Immigration Judge



CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED VIA:

MAIL PERSONAL SERVICE (P) ELECTRONIC SERVICE (E)

TO: () RESPONDENT () RESPONDENT C/O CUSTODIAL OFFICER

RESPONDENT'S ATTY/REP DHS

DATE: 3-13-23 BY: COURT STAFF [Signature]

ATTACHMENTS: () EOIR-33 () EOIR-28 () LEGAL SERVICES LIST () OTHER