6-18-19

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

IN THE MATTER OF:)
)
[redacted]) **In Removal Proceedings**
)
A[redacted])
)
Respondent)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "Act"): 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)
Withholding of Removal under the Convention Against Torture, pursuant to 8 C.F.R. § 1208.16

ON BEHALF OF THE RESPONDENT:
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ON BEHALF OF DHS:
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DECISION OF THE IMMIGRATION COURT

I. Procedural History

The Respondent, [redacted] is a native and citizen of Guatemala. Exh. 1. The U.S. Department of Homeland Security ("DHS") initiated removal proceedings against the Respondent on [redacted] by filing of a Notice to Appear ("NTA") with the [redacted] Immigration Court. *Id.* The NTA alleges that the Respondent: (1) is not a citizen or national of

the United States; (2) is a native and citizen of Guatemala; (3) arrived in the United States at or near an unknown place, on or about [redacted] and (4) was not then admitted or paroled after inspection by an Immigration Officer. *Id.* The NTA charges the Respondent as removable under INA § 212(a)(6)(A)(i). *Id.* [redacted], a change of venue was granted for the Boston Immigration Court ("Court"). Order of the Immigration Judge (IJ Eleazar Tovar [redacted]).

The Respondent conceded proper service of the NTA and waived a formal reading of the allegations. She admitted the allegations and conceded the charge of removability. She declined to designate a country of removal. Exh. 2. In lieu of removal, the Respondent indicated that she would apply for asylum, withholding of removal, withholding of removal under Article III of the U.N. Convention Against Torture ("CAT"). *Id.* The Respondent filed Form I-589, Application for Asylum and for Withholding of Removal, on [redacted]. Exh. 3. At a hearing on [redacted], the Respondent indicated that she was no longer seeking voluntary departure. On June 3, 2019, the Respondent filed a memorandum of law and supporting documents.

II. Documentary Evidence

Exhibit 1:	Notice to Appear, filed [redacted].
Exhibit 2:	Written Pleading, filed October 30, 2007.
Exhibit 3:	Form I-589, Application for Asylum and for Withholding of Removal, filed February 12, 2008.
Exhibit 3A:	Updated Form I-589, Application for Asylum and for Withholding of Removal, filed October 14, 2009.
Exhibit 4:	Respondent's Supplemental Supporting Documents, filed October 14, 2009.
Exhibit 5:	Respondent's Supplemental Supporting Documents, filed May 25, 2011.
Exhibit 6:	Respondent's Supplemental Supporting Documents, filed February 13, 2012.
Exhibit 7:	Respondent's Supplemental Supporting Documents, filed April 23, 2019.

III. Testimonial Evidence

On May 7, 2019, the Respondent testified in support of her applications for relief. Her partner, [redacted] also testified on her behalf. In lieu of testimony, the parties stipulated to the evaluation of Dr. [redacted] Ed.D., Licensed Clinical Psychologist. *See* Exh. 6 at 186.

IV. Standards of Law

A. Removability

A respondent who is charged with an inadmissibility ground must prove by clear and convincing evidence that she is lawfully in the United States pursuant to a prior admission, or that she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2). The determination regarding removability shall be based only on evidence produced at the hearing. INA § 240(c)(1)(A).

B. Credibility and Corroboration

In all applications for asylum, the Court must make a threshold determination of the alien's credibility. *See* INA § 208(b)(a)(B); *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998). The provisions of the REAL ID Act of 2005 apply to the Court's credibility analysis in applications filed after May 11, 2005. REAL ID Act § 101(h)(2) (codified at INA § 208 note). Considering the totality of the circumstances and all relevant factors, the Court may base a credibility determination on:

> the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.

INA § 208(b)(1)(B)(iii).

An applicant's testimony may be sufficient to sustain her burden of proving eligibility for asylum or withholding of removal without corroboration as long as the Court is satisfied that the testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that she is a refugee. *See Jianli Chen v. Holder*, 703 F.3d 17, 21 (1st Cir. 2012). However, if the Court determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided. INA §§ 208(b)(1)(B)(ii), 240(c)(4)(B); *Balachandran v. Holder*, 566 F.3d 269, 273 (1st Cir. 2009). "[T]he weaker an alien's testimony, the greater the need for corroborative evidence." *Mukamusoni v. Ashcroft*, 390 F.3d 110, 122 (1st Cir. 2004) (quoting *Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998)).

Unreasonable demands may not be placed on an applicant to present evidence to corroborate particular experiences, but "where it is reasonable to expect corroborating evidence

for certain alleged facts . . . such evidence should be provided." *Soeung v. Holder*, 677 F.3d 484, 487-88 (1st Cir. 2012) (quoting *Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997)). If such evidence is unavailable, the applicant must explain its unavailability, and the Court must ensure that the explanation is included in the record. *Id.* at 488. The absence of such corroboration can lead to a finding that an applicant has failed to meet her burden of proof. *See Guta-Tolossa v. Holder*, 674 F.3d 57, 62 (1st Cir. 2012) ("[A]n IJ can require corroboration whether or not she makes an explicit credibility finding . . . ."); *see also Matter of S-M-J-*, 21 I&N Dec. at 725.

An applicant's inconsistent statement may lead to an adverse credibility finding, regardless of whether the inconsistency goes to "the heart" of the claim. INA § 208(b)(1)(B)(iii); *see also Rivas-Mira v. Holder*, 556 F.3d 1, 4 (1st Cir. 2009). Credibility determinations must be "reasonable" and "take into consideration the individual circumstances of the applicant." *Lin v. Mukasey*, 521 F.3d 22, 27 n.3 (1st Cir. 2008) (quoting H.R. Rep. No. 109-72, at 167 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 292). The Court must provide "specific and cogent reasons why an inconsistency, or a series of inconsistencies, render the alien's testimony not credible." *Jabri v. Holder*, 675 F.3d 20, 24 (1st Cir. 2012) (quoting *Stanciu v. Holder*, 659 F.3d 203, 206 (1st Cir. 2011)). The Court must also consider an applicant's corroborative evidence, as "the presence of corroboration may save an asylum application notwithstanding [an] alien's apparent lack of credibility." *Ahmed v. Holder*, 765 F.3d 96, 101 (1st Cir. 2014).

C. Asylum Pursuant to Section 208 of the Act

1. Statutory Eligibility

The Court may grant asylum to an applicant who proves that she is unwilling or unable to return to her country of nationality 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), 208(b)(1)(A)-(B); 8 C.F.R. § 1208.13(a); *see also Jutus v. Holder*, 723 F.3d 105, 110 (1st Cir. 2013).

a. Timeliness of Application

An asylum applicant must prove by clear and convincing evidence that her application was filed within one year of her arrival in the United States, or by April 1, 1997, whichever is later. INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)(2)(i)(A). An applicant who cannot meet this burden must prove to the satisfaction of the Court that a changed or extraordinary circumstance excuses her late filing. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)-(5).

To prove an extraordinary circumstance, the applicant must establish that (1) she did not intentionally create the circumstances through her own action or inaction, (2) those circumstances were directly related to her failure to file the application within the one year period, and (3) the delay was reasonable under the circumstances. *Matter of Y-C-*, 23 I&N Dec. 286, 287 (BIA 2002). Possible examples of extraordinary circumstances include serious illness; mental, physical, or legal disability; ineffective assistance of counsel; maintenance of other lawful immigration status; or the death or serious illness of the applicant's representative or immediate family member. 8 C.F.R. § 1208.4(a)(5).

b. Past Persecution

Persecution is "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Persecution does not encompass generally harsh conditions shared by many others in a country or the harm an individual may experience as a result of civil strife. *Maryam v. Gonzales*, 421 F.3d 60, 63 (1st Cir. 2005). Instead, to qualify as persecution, a person's experience must "rise above unpleasantness, harassment, and even basic suffering" and consist of systemic mistreatment rather than a series of isolated events. *Rebenko v. Holder*, 693 F.3d 87, 92 (1st Cir. 2012) (quoting *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000)). The "severity, duration, and frequency of physical abuse" are relevant factors to this determination. *Topalli v. Gonzales*, 417 F.3d 128, 133 (1st Cir. 2005). The targeted abuse of an applicant's family may qualify as persecution of the applicant. *Precetaj v. Holder*, 649 F.3d 72, 76 (1st Cir. 2011) ("Two kidnappings, three beatings, and an aggravated rape of his children – specifically designed to send a message to [the respondent] – were clearly part of the persecution of him.").

c. Well Founded Fear of Future Persecution

An applicant who has suffered past persecution on account of a protected ground is presumed to have a well-founded fear of future persecution on account of that same protected ground. 8 C.F.R. § 1208.13(b)(1). This presumption may only be rebutted if DHS establishes by a preponderance of the evidence that (1) the applicant can reasonably relocate within his country of origin or (2) there has been a "fundamental change in circumstances" in the country at issue, such that the applicant's fear is no longer well-founded. *Id.*

An applicant who has not suffered past persecution must demonstrate a subjectively genuine and objectively reasonable fear of future persecution. 8 C.F.R. § 1208.13(b)(2)(i); *see also Sunarto Ang v. Holder*, 723 F.3d 6, 10 (1st Cir. 2013). Generally, an individual's credible testimony that she fears persecution satisfies the subjective component of this inquiry. *See Cordero-Trejo v. INS*, 40 F.3d 482, 491 (1st Cir. 1994). An applicant satisfies the objectively reasonable component by either (1) producing "'credible, direct, and specific evidence' supporting a fear of *individualized* persecution in the future," or (2) "demonstrating 'a pattern or practice in his or her country of nationality . . . of persecution of a group of persons similarly situated to the applicant on account of' a protected ground." *Decky v. Holder*, 587 F.3d 104, 112 (1st Cir. 2009) (quoting *Guzmán v. INS*, 327 F.3d 11, 16 (1st Cir. 2003) & 8 C.F.R. § 1208.13(b)(2)(iii)(A)).

An applicant seeking asylum based on a well-founded fear of persecution by a non-government actor must also demonstrate that she could not avoid persecution by relocating to another part of her country of nationality. 8 C.F.R. § 1208.13(b)(2)(ii), (b)(3)(i). An applicant may meet this burden by showing either that she is unable to relocate safely or that, under all the circumstances, it would not be reasonable to expect him to do so. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33-36 (BIA 2012); *see also* 8 C.F.R. § 1208.13(b)(2)(ii), (b)(3)(i).

d. On Account of a Protected Ground

The applicant must establish that a statutorily protected ground—race, religion, nationality, membership in a particular social group, or political opinion—is "at least one central reason" for the applicant's past persecution or the future persecution that he or she fears. INA §§ 101(a)(42)(A), 208(b)(i); *see also Sugiarto*, 586 F.3d at 95; *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212-215 (BIA 2007). Persecution on account of any of the statutorily protected grounds refers to persecution motivated by the victim's traits, not the persecutor's. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

Overall, an applicant for asylum or withholding of removal based on membership in a particular social group must establish that the proposed group: (1) is composed of members who share a common immutable characteristic; (2) is defined with particularity; and (3) is socially distinct within the society in question. *Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 222, 237 (BIA 2014). The shared characteristic may be innate or it may be a shared past experience. *Matter of Acosta*, 19 I&N Dec. at 233. However, it must be a characteristic that the members of the group cannot change or should not be required to change as a matter of conscience. *Id.* at 233-34. Particularity requires that the proposed group be "discrete and have definable boundaries – it must not be amorphous, overbroad, diffuse or subjective." *Matter of M-E-V-G-*, 26 I&N Dec. at 239. Social distinction (formerly known as social visibility) means that the group must be perceived as a distinct social group by society, regardless of whether society can identify the members of group by sight. *Matter of W-G-R-*, 26 I&N Dec. at 216-17 (renaming the "social visibility" element as "social distinction" to clarify that social visibility does not mean "ocular" visibility). To demonstrate social distinction, an applicant must provide evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. *Id.* at 217. Social distinction may not be determined solely by the perception of an applicant's persecutors. *See id.* at 218; *Matter of M-E-V-G-*, 26 I&N Dec. at 242. A respondent may meet their burden by providing "some evidence" of her persecutors' motives. *Elias-Zacarias*, 502 U.S. at 483.

e. Government Action

The applicant must also show that the persecution she faced or fears is a direct result of government action, government-supported action, or the government's unwillingness or inability to control private conduct. *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010). "[V]iolence by private citizens . . . absent proof that the government is unwilling or unable to address it, is not persecution." *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir. 2007). "[A]n applicant seeking to establish persecution by a government based on violent conduct of a private actor must show more than 'difficulty . . . controlling' private behavior." *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007) (internal quotation marks omitted) (quoting *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005)); *see also Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980). This standard will not be met if the country's "inability to stop the problem is [in]distinguishable from any other government's struggles to combat a criminal element." *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009); *see also Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013). However, a government's willingness to take on a persecutor does not necessarily establish its ability to protect citizens from that persecution. *Khattak v. Holder*, 704 F.3d 197, 206 (1st Cir. 2013).

2. Discretion

Statutory and regulatory eligibility for asylum does not compel a grant of asylum. 8 C.F.R. § 1208.14(a). An applicant for asylum must also prove that a favorable exercise of discretion is warranted. *Matter of F-P-R-*, 24 I&N Dec. 681, 685-86 (BIA 2008) (citing *Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987), *superseded by regulation on other grounds*). Factors that fall short of the grounds for mandatory denial may constitute discretionary considerations. *Matter of Pula*, 19 I&N Dec. at 473-74.

D. Withholding of Removal Pursuant to Section 241(b)(3) of the Act

Section 241(b)(3) of the Act is a non-discretionary provision requiring the Court to withhold removal of an individual upon proof that her life or freedom would be threatened in the proposed country of removal on account of her race, religion, nationality, political opinion, or membership in a particular social group. 8 C.F.R. § 1208.16(b). If an applicant establishes that she suffered past persecution in the proposed country of removal on account of a protected ground, the Court shall presume that the applicant's life or freedom would be threatened in the future in the country of removal on account of the same ground. 8 C.F.R. § 1208.16(b)(1). This presumption may only be rebutted if DHS establishes by a preponderance of the evidence that either (1) there has been a fundamental change in circumstances such that the applicant's life or freedom would no longer be threatened on account of a protected ground, or (2) the applicant could avoid future threats to her life or freedom by relocating to another area within the proposed country of removal where it is reasonable to expect the applicant to do so. *Id.* An applicant who has not suffered past persecution is eligible for withholding of removal if she demonstrates that it is "more likely than not" that she would be persecuted in the future in the proposed country of removal on account of a protected ground. 8 C.F.R. § 1208.16(b)(2).

E. Protection Under the Convention Against Torture

The CAT and implementing regulations mandate that no person shall be removed to a country where it is more likely than not that she will be subject to torture. *See* Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988); 8 C.F.R. §§ 1208.16-18; *see also Matter of G-K-*, 26 I&N Dec. 88, 93 (BIA 2013).

An applicant for withholding of removal under the CAT bears the burden of proof. 8 C.F.R. § 1208.16(c)(2). As with asylum adjudications, the applicant's testimony, if credible, may be sufficient to sustain the burden of proof without corroboration. *Id.*; *see also* INA § 240(c)(4)(C). However, an adverse credibility finding does not bar CAT relief. *Settenda v. Ashcroft*, 377 F.3d 89, 94-95 (1st Cir. 2004); *see also Matter of B-Y-*, 25 I&N Dec. 236, 245 (BIA 2010) (affirming the Immigration Judge's adverse credibility determination but remanding the record for consideration of the respondent's CAT application).

To establish a *prima facie* claim under the CAT, the "applicant must offer specific objective evidence showing that [s]he will be subject to: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) 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; and (5) not arising from lawful sanctions." *Rashad v. Mukasey*, 554 F.3d 1, 6 (1st Cir. 2009) (quoting *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004)) (internal quotations omitted). Acquiescence of a public official requires that the official have awareness of or remain willfully blind to the activity constituting torture, prior to its commission, and thereafter breach his or her legal responsibility to intervene to prevent such activity. *Mayorga-Vidal v. Holder*, 675 F.3d 9, 19-20 (1st Cir. 2012); *Matter of W-G-R-*, 26 I&N Dec. at 226 (citing *Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003)); 8 C.F.R. § 1208.18(a)(7).

In assessing whether the applicant has established a *prima facie* claim under the CAT, the Court must consider all evidence relevant to the possibility of future torture, including evidence that the applicant has suffered torture in the past; evidence that the applicant could relocate to a part of the country of removal where she is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal; and other relevant country conditions information. 8 C.F.R. § 1208.16(c)(3). However, a pattern of human rights violations in the proposed country of removal is not sufficient to show that a particular person would be tortured; specific grounds must exist to indicate that the applicant will be personally at risk of torture. *Settenda*, 377 F.3d at 95-96; *Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002). There is no requirement, however, that the torture be on account of a protected ground or that the applicant prove the reason for the torture. *Rashad*, 554 F.3d at 6.

V. Findings of Fact and Conclusions of Law

A. Removability

The Court finds that the Respondent is removable from the United States. The Respondent admitted the allegations and conceded the charge under section 212(a)(6)(A)(i) of the Act, as 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. Exh. 1; Exh. 2. Therefore, the Court finds that the Respondent is removable by evidence that is clear and convincing, and will proceed to consider her application for asylum, withholding of removal, protection under the CAT. The Court designates Guatemala as the country of removal.

B. Credibility and Corroboration

Because the Respondent filed her applications for relief after May 11, 2005, the REAL ID Act applies to her case. Applying those standards and considering the totality of the circumstances, the Court finds credible the Respondent's testimony regarding her experience in Guatemala and her fear of return. *See* INA §§ 208(b)(1)(B)(iii), 240(c)(4)(B)-(C). Her testimony was sufficiently internally consistent and generally consistent with her written declarations, including the Respondent's account of the abuse she suffered at the hands of her husband, [redacted] Further, DHS did not express concern regarding the Respondent's credibility or corroboration of her claim. Considering the foregoing and the entirety of the record, the Court declines to make an overall adverse credibility finding against the Respondent. Accordingly, the Court finds that the Respondent provided credible testimony and sufficient corroboration of her claim. *See* INA § 208(b)(1)(B)(iii).

C. Asylum Pursuant to Section 208 of the Act

1. Statutory Eligibility

a. Timeliness of Application

On May 7, 2019, the parties stipulated that the Respondent timely filed her asylum application, pursuant to *Mendez Rojas v. Johnson,* 305 F.Supp.3d 1176 (W.D. Wash. Mar. 29, 2018). Thus, the Court will treat the application as timely filed.

b. Nexus

The Court finds that the Respondent belongs to the particular social group of "Guatemalan women," and that such group is cognizable under the law. To be cognizable under the law, a particular social group must be: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 237, 237 (BIA 2014).

First, the Court finds that this social group is immutable, as it consists of two innate characteristics fundamental to an individual's identity. An immutable characteristic is one that the members of the group cannot change or should not be required to change as a matter of conscience. *Matter of Acosta*, 19 I&N Dec. at 233-34; *Matter of A-B-*, 27 I&N Dec. at 320 (reaffirming the common immutable characteristic standard set forth in *Matter of Acosta*). Both terms, "Guatemalan" and "women," or more generally, nationality and gender, are prototypical examples of immutable characteristics because one either cannot change or be required to change one's nationality or gender. *Matter of Acosta*, 19 I&N Dec. at 233; *Perez-Rabanales v. Sessions*, 881 F.3d 61, 66 (1st Cir. 2018) (gender constitutes an immutable characteristic for purposes of a particular social group). Furthermore, in *Matter of Acosta*, the Board of Immigration Appeals ("Board") specifically noted that "sex" is a "shared characteristic" on which particular social group membership can be based. *Matter of Acosta*, 19 I&N Dec. at 233. Therefore, the Court finds that the social group, "Guatemalan women" is comprised of immutable characteristics.

Second, the Court finds that the Respondent's particular social group is sufficiently particular. Particularity requires that the proposed group be "discrete and have definable boundaries – it must not be amorphous, overbroad, diffuse or subjective." *Matter of M-E-V-G-*, 26 I&N Dec. at 239; *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. at 189. These defining characteristics provide a clear benchmark for determining who falls within the group and who does not. *Matter of M-E-V-G-*, 26 I&N Dec. at 239. The definitional terms of the Respondent's social group are clearly defined and precise, as both gender and nationality have commonly understood meanings that are unlikely to change when defined by different individuals. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007) (finding that the particular social group defined by "affluent Guatemalans" was not particular because "affluence is simply too subjective, inchoate, and variable."). Accordingly, Respondent's group is not amorphous because its defining terms provide an adequate benchmark – gender – for determining group membership.

The Respondent's proposed particular social group is large, however this is not fatal to finding the group cognizable. Though size is a factor to be considered in the analysis of particular social groups, the Board has routinely found large particular social groups to be cognizable. For example, in *Matter of S-E-G-*, the Board stated that while "the size of the group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed description is sufficiently 'particular' or is 'too amorphous . . . to create a benchmark for determining group membership.'" *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008) (internal citations omitted). The Board and several circuits have employed such reasoning to affirm large social groups. For example, the Board has repeatedly found particular social groups based on sexual orientation to be cognizable, despite the fact that such groups may be vast in number. *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (recognizing "homosexuals . . . in Cuba" as members of a particular social group); *Matter of W-G-R-*, 26 I&N Dec. at 219 (affirming "homosexuals in Cuba" as a particular social group because, in part, it is defined with particularity). *Cf. Matter of H-*, 21 I&N Dec. 337, 342-43 (BIA 1996) (finding a Somali clan can constitute a particular social group); *see also Cece v. Holder*, 733 F.3d 662, 674-75 (7th Cir. 2011) (citing to *Matter of H-*, 21 I&N Dec. 337, and stating that the "breadth of the social group says nothing about the requirements for asylum"); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (recognizing "Somali females" as a particular social group given the widespread practice of female genital mutilation); *Mohammed v. Gonzalez*, 400 F.3d 785, 797 (9th Cir. 2005) (finding "Somali females" to be a cognizable particular social group due to the 98% prevalence of female genital mutilation, and stating that "the recognition that girls or women of a particular clan or nationality . . . may constitute a social group is simply a logical application of our law"); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2005) (rejecting the notion that "a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum"). In these cases, and as explained by the Board in *Matter of S-E-G-*, the "key question" is not the group's size, but whether the definition provides an adequate benchmark for determining who is a member based on the record at hand. *Matter of S-E-G-*, 24 I&N Dec. at 584. The Court further notes that none of the other protected grounds contained in INA § 101(a)(42) are limited by size or prohibit diverse membership. For example, a nation may host millions of members of a particular religion, yet these individuals are not precluded from asylum if persecuted. Similarly, religious groups are composed of individuals with a wide variety of characteristics and experiences. Each protected ground is bound by an immutable characteristic. Thus, it follows that a proposed social group that establishes clear boundaries by way of its immutable characteristics is cognizable under the Act regardless of its size.

The Court finds that the Respondent's proffered particular social group, "Guatemalan women," is sufficiently particular. In the Respondent's case, the benchmark determinant is a combination of nationality and gender. The Court finds that the Respondent's social group is distinguishable from a similar social group struck down by the First Circuit in *Perez-Rabanales v. Sessions*. Therein, the First Circuit found that the proffered social group, "Guatemalan women who try to escape systemic and severe violence but who are unable to receive official protection," was insufficiently particular and was not socially distinct. *See Perez-Rabanales*, 881 F.3d at 67. The First Circuit reasoned that the "amorphous nature of this sprawling group precludes determinacy and renders the group insufficiently particular," and that the group "lacks any socially visible characteristics independent of the harm" suffered. *Id.* at 66-67. The Court finds that the Respondent's proffered group, "Guatemalan women" is more akin to those discussed above, and

particularly to the group accepted by the Eighth Circuit in *Hassan v. Gonzales*. *Hassan v. Gonzales*, 484 F.3d at 518. Given the widespread practice of female genital mutilation in Somalia, the Eighth Circuit recognized "Somali females" as a particular social group. The Eighth Circuit reasoned that "all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM," noting that "there is little question that genital mutilation occurs to a particular individual because she is a female. That is, possession of the immutable trait of being female is a motivating factor – if not a but-for cause – of the persecution." *Id.* (internal citation omitted); *see also Mohammed v. Gonzalez*, 400 F.3d at 797. Similarly, as discussed below, the nation-wide epidemic of violence against women in Guatemalan informs the recognition of the Respondent's social group and indicates that such violence occurs to a particular individual because she is a female. The Respondent's proffered group is thus distinguishable from that in *Perez-Rabanales*. It is neither amorphous nor sprawling, nor is it based on the harm feared.

The Court's analysis of sizeable and diverse groups is consistent with the Attorney General's decision in *Matter of A-B-*, which contains several statements, in dicta, cautioning against such groups. *Matter of A-B-*, 27 I&N Dec. 316. The decision suggests that social groups composed of "broad swaths of society" likely lack particularity, as they may be "too diffuse to be recognized as a particular social group." *Id.* at 335 (citing *Constanza v. Holder*, 647 F3d. 749, 754 (8th Cir. 2011)). For example, the Attorney General found that a group composed of "victims of gang violence" may not be sufficiently particular because members "often come from all segments of society, and they possess no distinguishing characteristic or concrete trait that would readily identify them as members of such a group." *Id.* This echoes the Board's decision in *Matter of W-G-R-*, which struck down a social group based on former gang membership because the respondent had not established that Salvadoran society would "generally agree on who is included" in the group. *Matter of W-G-R-*, 26 I&N Dec. at 221 (finding the proposed group lacked particularity "because it is too diffuse, as well as being too broad and subjective" as it "could include persons of any age, sex, or background"). In contrast, the Respondent's proffered social group possesses an objective, defining characteristic – gender – and is thus distinguished from the groups discussed in *Matter of A-B-* and *Matter of W-G-R-*. As explained below, and as supported by the facts on the record, this characteristic enables Guatemalan society to readily identify group members, despite the presence of other diverse characteristics. Finally, in *Matter of A-B-*, the Attorney General reiterated the necessity for a fact-based, case-by-case inquiry in the social group analysis – such as that undertaken here. This mandate cannot be reconciled with a broad prohibition against large, diverse social groups. *Matter of A-B-*, 27 I&N Dec. at 344; *W-Y-C- & H-O-B-*, 27 I&N Dec. at 189. Accordingly, the Respondent's proposed social group "Guatemalan women" meets the particularly requirement.

Third, the Court finds that the Respondent's proposed social group is socially distinct within Guatemalan society. Social distinction (formerly known as social visibility) means that the group must be perceived as a distinct social group by society, regardless of whether society can identify the members of group by sight. *Matter of W-G-R-*, 26 I&N Dec. at 216-17 (renaming the "social visibility" element as "social distinction" to clarify that social visibility does not mean "ocular" visibility). To demonstrate social distinction, an applicant must provide evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. *Id.* at 217. The Board has further explained that the "members of a particular social group will generally understand their own affiliation with the grouping." *Matter*

of M-E-V-G-, 26 I&N Dec. at 238. Through the Respondent's testimony and documentary evidence, she has established that Guatemalan society perceives women as sufficiently distinct from society as a whole to qualify as a particular social group.

The Court finds that the Respondent's proposed social group is socially distinct within Guatemalan society. Through the Respondent's testimony and documentary evidence, she has established that Guatemalan society perceives women as sufficiently distinct from society as a whole to qualify as a particular social group. The country conditions evidence in the record supports the finding that women in Guatemala are seen as a distinct group within the society, notably in terms of the violence and danger that they face in the country. The 2018 Department of State Human Rights Report states that "[v]iolence against women, including sexual and domestic violence, remained serious problems." Exh. 7 at 311. Femicide remained a serious issue. *Id.* Moreover, the Guatemalan government has passed specific laws to combat the problem of gender-based violence, including penalties for femicide, development of specialized courts for violence against women, and the creation of a national alert system for missing women. *Id.* This evidence indicates that Guatemalan society views women as a separate and distinct group, and the Respondent's testimony shows that she affiliates herself with such group. *Matter of M-E-V-G-*, 26 I&N Dec. at 238.

Finally, the Court emphasizes that the Respondent's articulated social group is perceived by Guatemalan society independently from any group member's experienced persecution. Thus, the Respondent's articulated group is neither defined solely by the persecutor's perception nor by its persecution. *Matter of A-B-*, 27 I&N Dec. at 317 (holding that the social group must "exist independently of the alleged underlying harm"); *Perez-Rabanales v. Sessions*, 881 F.3d 61, 67 ("A sufficiently distinct social group must exist independent of the persecution claimed to have been suffered by the alien and must have existed before the alleged persecution began") (collecting cases). Here, recognizing the nation-wide epidemic of violence against women informs the recognition of the Respondent's social group as opposed to creating it. In other words, the persecution faced by women may act as the catalyst that causes Guatemalan society to meaningfully distinguish the group, but the defining immutable characteristic exists independently of that persecution. *Matter of M-E-V-G-*, 26 I&N Dec. at 243; *see also Matter of W-G-R-*, 26 I&N at 237 (clarifying that persecutor's perceptions may be relevant because it is indicative of whether society views the group as distinct). As such, the Respondent has shown that Guatemalan women are "set apart, or distinct, from other persons within [Guatemala] in some significant way." *Matter of M-E-V-G-*, 26 I&N Dec. at 238. Therefore, the Court finds that the Respondent's articulated social group meets the requirements for social distinction and is cognizable under the Act.

c. Past Persecution on Account of a Protected Ground

The Court finds that the harm the Respondent suffered in Guatemala rises to the level of persecution. The Respondent testified that as a teenager she moved to Guatemala City to work as a domestic worker. It was during her employment that she was first attacked and raped by [redacted], the son of the family where she worked. She was later forced to marry [redacted] by her mother and her employer. Throughout the course of their marriage, the Respondent was repeatedly raped and abused by [redacted]. When the Respondent started working outside the home, [redacted] threatened her, telling her there would be consequences if she did not stop. Exh. 4 at 5. He then

hired four men to attack and rob the Respondent when she was carrying money that belonged to her employer. [redacted] threats and abuse continued. The Respondent feared that he would kill her. The Court finds that the harm the Respondent suffered – being repeatedly and consistently abused and raped – rises to the level of past persecution. *Matter of A-T-*, 24 I&N Dec. 296, 304 (2007) (listing rape as an example of "common types of persecution" a woman might endure), *vacated and remanded on other grounds by Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008).

The Court finds that the Respondent's membership in a particular social group comprised of "Guatemalan women" was one central reason for the harm that she suffered in Guatemala. As previously detailed, the Respondent suffered harm rising to the level of persecution. INA § 208(b)(1)(B)(i); *see also Matter of J-B-N- & S-M-*, 24 I&N Dec. 208. [redacted] repeatedly raped the Respondent because he believed that he was entitled to sex with her by virtue of her womanhood. He told her she "needed to fulfill [her] role as his wife." When he threatened her for working outside the home he told her "he did not like his wife going to work." Further, at one point early in their marriage, the Respondent left for her father's house, but was forced to return to [redacted]. Her father told her "a wife needed to be with her husband." The Respondent "need not establish the exact motivation of a 'persecutor' where different reasons for actions are possible, [but] [s]he does bear the burden of establishing facts on which a reasonable person would fear that the danger arises on account of [her] . . . membership in a particular social group." *Matter of Fuentes*, 19 I&N Dec. 658, 658 (BIA 1988). The Court further notes that the motives for the Respondent's persecution at the hands of her husband are echoed in the record evidence, which evinces a culture of machismo and illustrates a patriarchal culture within Guatemala where men feel as though they can control women and oftentimes use violence as a means of exerting that control. A staggering number of women in Guatemala face gender related violence. Country conditions evidence that there is a high incidence of violence against women in Guatemala. *See generally* Exh 4 (evidencing a pattern and culture of violence against women in Guatemala). Taking all of this into consideration, the Court finds that under the circumstances, the Respondent has established that her membership in a particular social group comprised of "Guatemalan women" was at least one central reason for the harm she suffered.

d. Government Action

The Respondent claims that she was persecuted by a private individual. As such, she must demonstrate that "flight from her country [was] necessary because her home government [was] unwilling or unable to protect her." *Matter of A-B-*, 27 I&N Dec. at 317; *see also* 8 C.F.R. § 1208.13(b)(1); *Ivanov v. Holder*, 736 F.3d 5, 20 (1st Cir. 2013) (to constitute persecution, the harm must be the direct result of government action, government-supported action, or the government's unwillingness or inability to control private conduct) (quoting *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008)). The government must be unable or unwilling to protect the Respondent.[1] *Rosales Justo v. Sessions*, 895 F.3d 154, 167 (1st Cir. 2018) (finding that the BIA

[1] In *Matter of A-B-*, the Attorney General reaffirmed the "unable or unwilling to control" standard, but also held that an asylum applicant must show that the government "condoned" the private actors or at least "demonstrated a complete helplessness to protect the victims." 27 I&N Dec. at 337 (citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)). Thus, the Attorney General sets forth three different standards: "unable or unwilling to control," "condoned," and "complete helplessness." *Matter of A-B-*, 27 I&N Dec. at 337. This conflicting language leaves the Court with questions as to what standard to apply when adjudicating asylum applications. To resolve this issue, the Court has reviewed relevant Board and First Circuit precedent. It is clear from a review of First Circuit case law that "unable or

erred in conflating unable and unwilling). The Court finds that the Respondent has established that the Guatemalan government is unable to protect her.

The Respondent testified that she never reported the abuse to police because she did not think the police would protect her. The record illustrates that despite the existence of these laws and attempts by the Guatemalan government, it continues to be unable to protect women such as the Respondent. Police are insufficiently trained and the government does not effectively enforce the laws criminalizing rape, including spousal rape. Exh. 7 at 311. Although the government has taken steps to combat femicide and violence against women, femicide has remained a "significant problem" and "violence against women, including sexual and domestic violence" has remained a "serious problem[.]" *Id.* at 311-12. "There is widespread immunity for the perpetrators due to the failure of the government to adequately investigate and prosecute these crimes." *Id.* at 274. The passage of laws and other steps taken by the Guatemalan government to combat violence against women "show only the willingness of the government to enact laws, not the ability of the police [and society] to enforce the law." *Rosales Justo v. Sessions*, 895 F.3d 154, 167 (1st Cir. 2018) (internal citation omitted). Therefore, despite the evidence in the record regarding the Guatemalan government's efforts in combatting violence against women, the Court finds that the government is unable to protect the Respondent.

e. Well Founded Fear of Future Persecution

As the Respondent has established past persecution on account of a protected ground, she is presumed to have a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1). DHS has not established by a preponderance of the evidence that the Respondent can reasonably relocate in Guatemala or that there has been a "fundamental change in circumstances" in the Guatemala, such that her fear is no longer well-founded. *Id.*

2. Discretion

As discussed above, the Respondent meets the definition of a refugee and is eligible for asylum. *See* INA §§ 101(a)(42), 208(b)(1)(B). However, the Respondent must also prove that she merits asylum in the exercise of discretion. 8 C.F.R. § 1208.14(a); *see also Matter of F-P-R-*, 24 I&N Dec. at 685-86 (citing *Matter of Pula*, 19 I&N Dec. at 473-74).

The Court also finds that the Respondent merits relief as a matter of discretion. *Pula*, 19 I&N Dec. at 473-74. As there appears to be no countervailing negative factors in her case, the Court will grant her application for asylum as a matter of discretion. *See Matter of H-*, 21 I&N Dec. at 348 ("[T]he danger of persecution should generally outweigh all but the most egregious of

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unwilling to control" is the governing standard in the First Circuit. *See e.g.*, *Rosales Justo*, 895 F.3d at 166-67. The Court could not find Board or First Circuit case that uses or interprets the term "complete helplessness" as used by the Attorney General in *Matter of A-B-*. Absent such controlling case law, the Court chooses to apply the "unable or unwilling to control" standard when analyzing the Respondent's asylum claim. This interpretation is consistent with the D.C. District Court's recent decision in *Grace v. Whitaker*, 344 F.Supp.3d 96, 130 (D.D.C. 2018) ("The "unwilling or unable" persecution standard was settled at the time the Refugee Act was codified, and therefore the Attorney General's "condoned" or "complete helplessness" standard is not a permissible construction of the persecution requirement.").

adverse factors.")(quoting *Matter of Pula*, 19 I&N Dec. at 474).

D. Other Relief

As the Respondent has demonstrated her eligibility for asylum pursuant to section 208 of the Act, the Court need not and will not reach Respondent's eligibility for withholding of removal or relief under the Convention Against Torture. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (government agencies are not required to make findings on issues which are unnecessary to the result); *see also Mogharrabi*, 19 I&N Dec. at 449. The applications are deemed moot.

Based on the foregoing, the following orders shall enter:

ORDER

IT IS HEREBY ORDERED that the Respondent's application for asylum pursuant to INA § 208 is **GRANTED**.

If either party elects to appeal this decision, the Notice of Appeal must be received by the Board of Immigration Appeals within thirty (30) days of this decision. 8 C.F.R. § 1003.38(a)-(b).

6/18/15
Date

PAUL M. GAGNON
United States Immigration Judge