UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Arlington Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
	)	
	)	**File No.:** A
	)	
Respondent.	)	
	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, ("INA" or "Act"), as aliens 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); and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), pursuant to 8 C.F.R. §§ 1208.16-.18.

APPEARANCES

ON BEHALF OF THE RESPONDENT:

ON BEHALF OF DHS:
Dylan Staknis, Esq.
Assistant Chief Counsel
U.S. Department of Homeland Security
1901 South Bell Street, Suite 900
Arlington, VA 22202

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The respondent is a citizen and national of El Salvador. She entered the United States without inspection on or about April 7, 2014, near Hidalgo, Texas. Ex. 1. On April 30, 2014, the Department of Homeland Security ("DHS") served the respondent with a Notice to Appear ("NTA"), charging him with inadmissibility under § 212(a)(6)(A)(i) of the Act. *Id.* The NTA was filed with the Court on April 30, 2014. The respondent admitted the allegations and conceded inadmissibility as charged at a hearing on May 13, 2014. Accordingly, the Court finds inadmissibility has been established. *See* 8 C.F.R. § 1240.10(c). On May 20, 2014, the respondent

filed an Application for Asylum and for Withholding of Removal ("Form I-589"), seeking asylum and withholding of removal under the Act and for relief under the CAT. Ex. 2.

For the reasons that follow, the Court grants the respondent's application for asylum under the Act.

II. SUMMARY OF THE EVIDENCE

A. Documentary Evidence

Exhibit 1: The respondent's NTA, filed April 25, 2014;
Exhibit 2: The respondent's Application for Asylum and for Withholding of Removal (Form I-589), dated May 20, 2014;
Exhibit 3: 2013 El Salvador Human Rights Report;
Exhibit 4: Supplemental documents in support of the respondent's application for asylum, including Tabs A-AAA, filed December 17, 2015;
Exhibit 5: Supplemental documents in support of the respondent's application for asylum, including Tabs BBB-HHH, filed June 26, 2019;
Exhibit 6: The respondent's Amended Application for Asylum and for Withholding of Removal (Form I-589), filed July 11, 2019;
Exhibit 7: News Report: El Salvador's murder rate decreases for third straight year, dated February 1, 2019, filed July 11, 2019; and
Exhibit 8: News Report: What's behind El Salvador's recent drop in homicides, dated October 3, 2018, filed July 11, 2019.

B. Testimonial Evidence

The Court heard testimony from the respondent on July 17, 2019. The testimony provided in support of the respondent's application, although considered by the Court in its entirety, is not fully repeated herein, as it is part of the record. Rather, the claims raised during her testimony are summarized below to the extent they are relevant to the Court's subsequent analysis.

The respondent testified that she was born February 4, 1980, in El Salvador, and grew up in Chalatenago, El Salvador. She lived in El Salvador until she came to the United States in April 2014. She has two children: a 19 year old daughter; and a 16 year old son. While not relevant to the resolution of the respondent's claims in this case, the respondent testified to extensive physical, sexual, and emotional abuse at the hands of the children's father, Elmer. The respondent did report Elmer's abuse to the local authorities, though, and the police did almost nothing; they would claim to look for him, but then take no action. The respondent fled to live with her mother to escape the abuse; Elmer died in 2009.

Five months after the respondent escaped to her mother's house, in 2008, a pair of men were walking past the home. The two men, Jeu and Filin, were known to the respondent; Jeu had known the respondent since she was a little girl. As the men passed by the house, the family dog bit Filin who became enraged and said he was going to kill the animal and the respondent. The police were called and asked the respondent where Filin lived and the respondent told them.

Hearing of the respondent's cooperation with the police, Jeu came to her home with a curved machete, informed the respondent that he was a member of a gang, and proceeded to scream threats at the respondent, calling her a "b**ch" and a "whore." The respondent again called the police and the police arrested Jeu. Jeu claimed that he did not care about the police or anyone because he was in the MS-13 gang. The respondent knew Jeu lived in the neighborhood or colonia next to hers and Jeu knew where the respondent lived.

After the arrest, the respondent agreed to testify against Jeu upon the request of a judge. The respondent was afraid of Jeu, but summoned the courage and testified in court. Jeu was released on a claim of insufficient evidence. Two weeks later, Jeu saw the respondent at a bus stop and Jeu told her that he was going to rape the respondent for reporting her to the police.

Fearing for her safety and in search of better opportunity, the respondent obtained work in the capital city, San Salvador, and began staying there for weeks at a time. When she returned home to Chalatanego, however, she would occasionally see Jeu. Jeu would say things to the respondent along the lines of: "remember that I have not forgotten what you did." *See* Ex. 4, Tab F, at 16, ¶ 10; *see also* Ex. 5, Tab BBB, at 5, ¶ 31. These threats continued for years. The respondent testified that it is dangerous to testify in court against a gang member because the gangs take actions to hurt witnesses.

In or around 2012, the respondent began receiving anonymous letters demanding extortion payments or "renta" and warning that the failure to do so would result in harm to the respondent's children. The letters included information on the routes her children took to school. The respondent removed her children from the school. Her children also had threatening encounters with the gangs: gang members demanded her son join them; and her daughter was threatened by gang members.

Finally, in March 2014, the respondent was back at her mother's house and was looking towards her neighbor's house when she heard shots. The respondent saw two persons she identified as gang members due to their baggy clothes and their hairstyles, and realized they had just murdered her neighbor. The respondent saw the murderers, but did not recognize them. The murderers saw the respondent as they fled. Subsequently, about two or three days later, the respondent was going to work on the bus when a man on a bicycle rode by her and told her that she had "better keep quiet" about the murder. The respondent testified that she believed that the gang members would take action against her (including killing her) if she reported the murder.

Tired after living in fear of gang members for over six years, the respondent fled El Salvador for the United States. Just days prior to her departure, she received additional threatening letters. The evidence in the record shows that despite progress made by El Salvador in anti-gang efforts and reduction in the murder rate, the rate of *femicide* and the country's inability to prevent and prosecute the perpetrators of the murders of women remain extreme problems. *See, e.g.*, Ex. 4, Tab Z, at 101 ("Violence against women rises in El Salvador"); *see also* Ex. 5, Tab EEE, at 155 ("El Salvador posts highest rate of women murdered in Latin America"); *id.* at 238 ("El Salvador: One of the most dangerous places in the western hemisphere for women and girls" (Jan. 18, 2018)).

III. LAW, FINDINGS, AND ANALYSIS

A. Credibility and Corroboration

When a respondent offers testimony in support of an application for relief, the Court must determine whether such testimony is credible. INA § 240(c)(4)(B). For applications filed after May 11, 2005, the provisions of the REAL ID Act of 2005 govern the credibility analysis. In making a credibility determination, the Court considers the totality of the circumstances and all relevant factors. *See id.* § 240(c)(4)(C); *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). Generally, to be credible, testimony should satisfactorily explain any material discrepancies or omissions. INA § 240(c)(4)(C). The Court may base a credibility determination on the witness' demeanor, candor, or responsiveness, and the inherent plausibility of her account. *Id.* Other factors include the consistency between written and oral statements, without regard to whether an inconsistency goes to the heart of a respondent's claim. *Id.*; *J-Y-C-*, 24 I&N Dec. at 263-66.

The respondent's testimony was sufficiently detailed, plausible, and consistent with her applications for relief and documentary evidence. *See* Ex. 2 & 6 (Form I-589); Ex. 4-5 (supporting documentation). Additionally, the respondent provided a detailed and credible account of her experiences in El Salvador and expressed a genuine fear of return. The respondent's impressions of conditions in El Salvador, particularly allegations of corruption by the police and violence by opposing political groups, were corroborated by affidavits from family members and were generally consistent with her prior sworn statements. Ex. 4, Tab F; *see also* Ex. 5, Tab BBB. Any inconsistencies were overcome by the abundant corroboration and overall consistency in her testimony, coupled with her demeanor and responsiveness to questioning. As such, the Court credits the respondent's testimony in full under the totality of the circumstances.

B. Asylum

An applicant for asylum must demonstrate that she is unwilling or unable to return to her country of origin either because she has suffered past persecution or because she has a well-founded fear of future persecution on account of a protected ground- race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). The persecution must be at the hands of the applicant's government or of an agent that the government is unwilling or unable to control. *See Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000). If the applicant establishes past persecution on account of a protected ground, there is a rebuttable presumption that she has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1). The persecutors' motivations are a question of fact, and testimonial evidence may be sufficient to establish a protected ground motivated the harm. *Matter of S-P-*, 21 I&N Dec. 486, 490 (BIA 1996). Supporting documents and corroborative background evidence "must [also] be taken into account." *Id.*

1. Past Persecution

a. Past Harm

The Fourth Circuit Court of Appeals has repeatedly and "expressly held that 'the threat of death qualifies as persecution.'" *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011). It has also held that, "[e]xtortion itself can constitute persecution, even if the targeted individual will be physically harmed only upon failure to pay." *Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015). Moreover, "[a]pplicants who demonstrate past persecution are presumed to have a well-founded fear of future persecution." *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006).

The Court finds that the respondent suffered harm rising to the level of persecution. The respondent testified gang members threatened her life repeatedly over a period of six years, brandishing weapons, threatening her with rape, threatening her children with death, and demonstrating their deadly capabilities through the murder of the respondent's neighbor which she witnessed. These incidents rise to the level of persecution. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) ("[W]e have expressly held that 'the threat of death qualifies as persecution'") (citing *Crespin-Valladares*, 632 F.3d at 126). The Court next considers whether the harm the respondent suffered occurred at the hands of an agent the government was unable or unwilling to control.

b. Government unable/unwilling to Control

An applicant for asylum must establish that her persecution will be at the hands of government officials or an agent that the government is unwilling or unable to control. *See Matter of S-A-*, 22 I&N Dec. at 1335. A stable government's mere "difficulty" in controlling private actors' conduct is not necessarily indicative of an inability to do so. *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980). However, even where a government displays a willingness to control the private actors, such as gangs, the "*efficacy* of those efforts" must also be examined to determine the government's ability. *See Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (emphasis added).

Here, the respondent courageously stood up to the gang members and repeatedly sought protection from the authorities, including agreeing to testify against at least two of her tormentors. Despite her efforts, the authorities could not protect her or stop the ceaseless threats against her life and, later, the lives of her children. These facts are consistent with the descriptions of the Salvadoran government contained in the extensive documentary evidence, *see, e.g.*, Ex. 4 (containing extensive evidence of the failures of the Salvadoran government to protect its citizens from violence, particularly at the hands of gangs). Based upon this evidence, the Court finds that the respondent has carried her burden and shown that her persecutors are actors the government is unable and unwilling to control. This finding is consistent with the recent instruction from an opinion binding on this Court in *Orellana v. Barr*, 925 F.3d 145, 152 (4th Cir. 2019) ("But access to a nominal or ineffectual remedy does not constitute 'meaningful recourse,' for the foreign government must be both willing and able to offer an applicant protection.") (quoting *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010)).

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2. Nexus to a Protected Ground

An asylum applicant must also demonstrate that a protected ground, such as a political opinion, was "at least one central reason" for the persecution she suffered. INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212-14 (BIA 2007). "The applicant need not prove that the protected ground was *the* central reason or even a dominant central reason for the persecution; he need only show that the protected ground was more than an incidental, tangential, superficial, or subordinate reason underlying the persecution." *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247 (4th Cir. 2017) (quoting *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009)) (internal quotation marks omitted). In conducting a nexus analysis, a court must consider not only the "'articulated purpose'" of a persecutor's threats, but also the "'intertwined reasons'" for those threats. *Id.* at 248 (quoting *Cruz v. Sessions*, 853 F.3d 122,129 (4th Cir. 2017)).

The respondent proffered six bases for her persecution: (1) the PSG of women in El Salvador; (2) the PSG of women in domestic relationships in El Salvador; (3) the PSG of family members of the respondent's son and daughter; (4) the PSG of single Salvadoran mothers/Salvadoran female heads of households; (5) the PSG of Salvadoran informants/testifying witnesses; and (6) political/imputed political opinion.

The Court declines to determine—though it has serious doubts—whether proposed PSGs (1), (2), and (4) are cognizable or sufficiently particular under the law. To satisfy the particularity requirement, a proposed particular social group "must be defined by characteristics that provide a clear benchmark for determining who falls within the group." *M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014). "The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *Id.* A group is socially distinct if "society in general perceives, considers, or recognizes persons" sharing a particular characteristic or set of characteristics as constituting a group. *Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014). The evidence seems to fall far short of showing that any of those three proposed PSGs satisfies these requirements.[1]

a. Political/Imputed Political Opinion

There can be no dispute, however, that a respondent's political opinion is a protected ground in the asylum context. The first showing to satisfy the nexus requirement when the proposed protected ground is political opinion is prototypically met by evidence of verbal or openly expressive behavior by the applicant in furtherance of a particular cause. *See, e.g., Camara v. Ashcroft*, 378 F.3d 361, 364 (4th Cir. 2004) ("demonstrating with students" and participating in a "protest march" for ethnic rights demonstrates political opinion for asylum purposes).

[1] The respondent's proposed PSG of "family members of the respondent's son and/or daughter" is certainly cognizable under binding Fourth Circuit precedent, *see Crespin-Valladares v. Holder*, 632 F.3d 117,125 (4th Cir. 2011), but the evidence of any past persecution or well-founded fear of future persecution occurring on the basis of this PSG is insufficient. Additionally, while the Fourth Circuit seems to have indicated in *Crespin-Valladares* and *Salgado-Sosa v. Sessions*, 882 F.3d 451, 457-59 (4th Cir. 2018), that a proposed PSG such as Salvadoran testifying witnesses may not be cognizable, the Court declines to reach that issue in this case because the evidence indicates it is, at the very least, a very close call. Because another proposed basis is dispositive on the issue, the Court need not make a determination.

Claims of persecution on account of imputed political opinion differ in an important way from those involving actual political opinion, though. When, as here, an applicant claims that she has been or will be persecuted on account of an imputed political belief, then the relevant inquiry is not the political views sincerely held or expressed by the victim, but rather the persecutor's subjective perception of the victim's views. *Alvarez Lagos v. Barr*, 927 F.3d 236, 254 (4th Cir. 2019) (citing *Haile v. Holder*, 456 F. App'x 275, 282-83 (4th Cir. 2011)). "The claim is examined from the perspective of the persecutor, not the victim, with the applicant required to show that her 'persecutors actually imputed a political opinion' to her." *Id.* (quoting *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 450-51 (4th Cir. 2007)) (internal quotation marks omitted).

Here, based upon the Fourth Circuit's instructions in *Alvarez Lagos*, the Court finds that the respondent has carried her burden of showing that the MS-13 gang ascribed to her an anti-gang opinion and that this imputed political opinion was at least *a* central reason (and maybe the only reason) why the gang persecuted her. Specifically, the respondent provided more than sufficient evidence that she confronted gang members both known and unknown to her when she was a witness to their actions, that she testified in open court and made her desire for punishment for the gang for its illegal activities known both to the authorities and to the gang, and that gang members threatened her with rape and death as a result. Thus, the respondent has established that she experienced past persecution at the hands of an actor the Salvadoran government was unwilling and unable to control, and that this persecution was on the basis of her imputed political opinion.

3. Well-Founded Fear of Future Persecution

Because the respondent established that she experienced past persecution on account of a protected ground at the hands of an actor the Salvadoran government is willing but unable to control, she benefits from a rebuttable presumption of future persecution. 8 C.F.R. § 1208.13(b)(1). To overcome this presumption, the DHS bears the burden of demonstrating, by a preponderance of the evidence, that: (1) there has been a fundamental change in circumstances such that the respondent no longer has a well-founded fear of future persecution; or (2) the respondent could avoid future persecution by reasonably relocating to another part of El Salvador. 8 C.F.R. § 1208.13(b)(1)(i)(A)-(B).

The Court finds DHS has not met its burden to rebut the presumption that the respondent's life or freedom would be threatened in the future. *Id.* DHS argued vigorously that either El Salvador's increased prosecution of gangs or the respondent's ability to come and go between Chalatanego and San Salvador shows the potential for safe internal relocation. DHS has not carried its burden on either point.

First, DHS has provided some evidence that El Salvador's murder rate has decreased and argued persuasively that the respondent herself availed herself of the services of law enforcement and the passage of time since her departure show sufficient changed circumstances. But again, the Fourth Circuit's instructions in *Orellana* make plain that this Court must review all of the evidence presented. 925 F.3d at 153 ("Evidence of empty or token 'assistance' cannot serve as the basis of a finding that a foreign government is willing and able to protect an asylum seeker.") The Court has reviewed substantial evidence the respondent presented of both her own inability to obtain

sufficient protection from law enforcement authorities to prevent continued threats of death and rape, as well as the extensive documentary evidence presented by the respondent that shows, among other things, a continuum of uncontrolled and unprosecuted violence against women by criminal elements in El Salvador (and those who oppose them) and this evidence far outweighs the two articles and snippets of helpful testimony to which the Government cites.

Second, while the respondent was able to leave her children in Chalatanego and work in San Salvador for periods of time, there is insufficient evidence to show she could live safely in San Salvador permanently or that it would be reasonable to do so. Indeed, the documentary evidence shows that, in the small geographic area of El Salvador, the gangs exercise control over almost every portion of the nation and San Salvador is no exception. *See, e.g.*, Ex. 4 and 5. Therefore, DHS has not carried its burden on this point either.

Based on the above considerations, the Court finds the respondent has a well-founded fear of persecution on account of her political opinion if she were returned to El Salvador. The Court next considers whether the respondent established she merits a favorable exercise of the Court's discretion.

4. Discretion

After an applicant establishes her statutory eligibility for asylum, the Immigration Court may exercise its discretion to grant or deny asylum. 8 C.F.R. § 1208.14(a); *see also* INA § 208(b)(1)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427-28 (1987); *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987). In applying discretion, the Court considers a non-exhaustive list of relevant factors and the totality of the circumstances; the danger of persecution generally outweighs "all but the most egregious of adverse factors."). *Pula*, 19 I&N Dec. at 473-74. The Court need not analyze each factor; rather, it must only review and discuss the relevant factors that support its decision. *Zuh v. Mukasey*, 547 F.3d 504, 510–11 (4th Cir. 2008).

The respondent established that she merits asylum in the exercise of discretion. She suffered persecution at the hands of an actor the government is unable and unwilling to control on account of her anti-gang political opinion and she has a well-founded fear of harm should she return to El Salvador. Additionally, she has no criminal history. The only negative factor is her entry without inspection and this alone cannot be enough to issue a discretionary denial. *See Matter of Kasinga*, 21 I&N Dec. 357, 368 (BIA 1996) (reversing the Immigration Judge's discretionary denial where the respondent established a well-founded fear of persecution and admitted to the purchase of a fraudulent passport to enter the United States illegally). Given the totality of the circumstances, the respondent's equities far outweigh her sole negative factor, and the Court grants her application for asylum in the exercise of discretion.

Because the Court grants the respondent's application for asylum, it does not reach her claim for withholding of removal under the Act.

IV. CONCLUSIONS

The Court grants the respondent's application for asylum because she established past persecution on account of her political opinion. Therefore, she benefits from the presumption of a well-founded fear of future persecution, which the DHS has not rebutted. Because the respondent merits a favorable exercise of discretion, the Court grants the respondent's application for asylum and does not reach her application for withholding of removal under the Act.

Accordingly, the Court enters the following order:

ORDER

It Is Ordered that: the respondent's application for asylum under INA § 208 be **GRANTED**.

7/30/19
Date

Wynne P. Kelly[2]
Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals on or before thirty (30) calendar days from the date of service of this decision.

[2] The signing immigration judge was transferred this matter for final resolution. Pursuant to 8 C.F.R. § 1240.1(b), the signing Immigration Judge has familiarized himself with the record.