

**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:)
)

G [REDACTED] R [REDACTED] S [REDACTED])
)
Applicant.)
_____)

In Withholding Only Proceedings

File No.: A [REDACTED]

CHARGE:

Section 238(b) of the Immigration and Nationality Act (“INA” or “Act”), as amended, as an alien not lawfully admitted for permanent residence at the time proceedings commenced who has been convicted of an aggravated felony under INA § 237(a)(2)(A)(iii) and has been issued an order of removal.

APPLICATIONS:

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 (“Convention Against Torture” or “CAT”) pursuant to 8 C.F.R. §§ 1208.16-18 (2019).

APPEARANCES

ON BEHALF OF THE APPLICANT:

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ON BEHALF OF THE DHS:

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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. FACTUAL AND PROCEDURAL HISTORY

The applicant is a native and citizen of El Salvador. *See* Exh. 1, p. 1.

On June 12, 2014, the applicant was convicted of felony Malicious Wounding in violation of Va. Code Ann. § 18.2-51; two counts of felony Criminal Gang Participation in violation of Va. Code Ann. § 18.2-46.2; felony Grand Larceny from the Person in violation of Va. Code Ann. § 18.2-95; and felony Abduction in violation of Va. Code Ann. § 18.2-47. *See* Exh. 5, Tab L, pp. 63, 67-69.

[REDACTED]

For the Malicious Wounding conviction, he was sentenced to ten years' imprisonment with six years suspended. *Id.* at 63-64, 67. For the first Criminal Gang Participation, Grand Larceny, and Abduction convictions, he was sentenced to two years' imprisonment with two years suspended for each offense. *Id.* at 63-64, 67-68. For the second Criminal Gang Participation conviction, he was sentenced to five years' imprisonment with three and a half years suspended. *Id.* at 63-64, 69. In total for these offenses, the applicant was sentenced to twenty-one years' imprisonment to run consecutively with fifteen and a half years suspended. *Id.* at 63-64.

On January 31, 2020, the Department of Homeland Security ("DHS") served the applicant a Notice of Intent to Issue a Final Administrative Removal Order, which indicated that pursuant to INA § 238(b), he was removable under INA § 237(a)(2)(A)(iii), as an alien not lawfully admitted for permanent residence at the time proceedings commenced who has been convicted of an aggravated felony as defined in INA § 101(a)(43)(F) and INA § 101(a)(43)(G). *See DHS Form I-851, Notice of Intent to Issue a Final Administrative Removal Order.* Because the applicant expressed a fear of harm upon return to his country, he had a reasonable fear interview with an asylum officer. *See* Exh. 1. On February 19, 2020, the asylum officer determined that the applicant had a reasonable fear of persecution or torture. *Id.* On February 26, 2020, the DHS filed a Form I-863, Notice of Referral to the Immigration Judge with the Court. *Id.*

On April 15, 2020, the applicant filed a Form I-589, Application for Asylum, Withholding of Removal, and protection under Article III of the Convention Against Torture. *See* Exh. 2.

On June 16, 2020, the applicant appeared at the individual merits hearing with counsel and presented his claims for withholding of removal and protection under the CAT. For the following reasons, the Court denies the applicant's application for withholding of removal under the Act and CAT and grants his application for deferral of removal under the CAT.

II. SUMMARY OF THE EVIDENCE

A. Documentary Evidence

- Exhibit 1: DHS Form I-863, Notice of Referral to Immigration Judge, including the Reasonable Fear Interview Notes, received February 26, 2020;
- Exhibit 2: Applicant's Form I-589, Application for Asylum, Withholding of Removal, and protection under the Convention Against Torture, received April 15, 2020;
- Exhibit 3: Applicant's Witness List and Exhibit List, Tabs A-KK, May 5, 2020;
- Exhibit 4: DHS's Notice of Filing (Part 1), Tabs A-H, received May 8, 2020;
- Exhibit 5: DHS's Notice of Filing (Part 2), Tabs I-L, received May 8, 2020; and
- Exhibit 6: Applicant's Supplemental Exhibit List, Tab LL, received June 15, 2020.

B. Summary of the Claim

On June 16, 2020, the Court heard testimony from the applicant and his two witnesses—expert witness, Dr. Robert O. Kirkland, PhD, and his mother, Y [REDACTED] R [REDACTED]. Although the Court has considered the applicant and his witnesses' testimonies in their entirety, they are not fully repeated herein as they are already part of the record. Rather, the claims raised during his individual merits

[REDACTED]

hearing are summarized below to the extent they are relevant to the Court's analysis of the applicant's request for relief.

1. Testimony of the Applicant

The applicant testified as follows:

The applicant is [REDACTED] old and was born on [REDACTED] in Usulután, El Salvador. He came to the United States in 2003 when he was seven years old. Upon his arrival, he lived with his parents who were already living in the United States. His parents frequently fought and the applicant witnessed his father, G [REDACTED], physically abuse his mother many times.

G [REDACTED] is a Mara Salvatrucha ("MS-13") gang member; the applicant knows that he is an MS-13 member because G [REDACTED] has gang-related tattoos. G [REDACTED]'s brothers and cousins are also MS-13 members who spent time at the applicant's home. G [REDACTED] frequently received phone calls about the gang's activities and everyone in their neighborhood in the United States knew that he was a gang member. G [REDACTED] also communicated with the MS-13 in El Salvador during this time. When the applicant was ten or eleven years old, G [REDACTED] stopped living with his family. The last time the applicant heard from G [REDACTED] was when he was thirteen years old.

When the applicant was ten or eleven years old and in middle school, his childhood friends introduced him to five or six MS-13 gang members who lived in their neighborhood in [REDACTED] Virginia. The applicant and his friends often spent time with the gang members at school, parties, and in the neighborhood. Because the applicant wanted to fit in with his friends and feared the gang, he became an "associate" of MS-13. The applicant voluntarily associated with the gang because the members acted like a father figure to him, as they took him under their wings, gave him advice, and made him feel included. Additionally, all of his close friends either became gang members or sought to become members. The applicant clarified that although the gang asked him to join their ranks, he declined their invitation to become a member or hold a position so that he would not disappoint his mother.

In order to become an MS-13 member, a recruit is "jumped in" and required to commit a violent crime like murder or robbery. Members, unlike associates, attend meetings, perform missions, and have a "voice" and sometimes a rank in the gang. Associates are given errands to complete and are expected to follow the gang members' orders; if they do not follow orders, the members harm them. The applicant feared ending his association with the gang completely because he worried that they would harm him or his family if he did so. He explained that the members would take offense if a close friend stepped away from the gang, as they want others to fear and respect them. He witnessed the gang severely beat another person who stepped back from the gang and refused to join. He further elaborated that anyone who stepped away from the gang is targeted for future beatings or even death.

The applicant was involved in two criminal incidents while he was an MS-13 associate. [REDACTED]

[REDACTED] The applicant participated in this incident to protect his friends and recognized that he should have stopped it but

[REDACTED]

chose not to do so. For his actions, he was convicted of abduction and sentenced to probation as well as placed on the radar of the police's gang unit. He violated the terms of his probation by leaving the house to attend parties with MS-13 members. The applicant was additionally convicted and sentenced to imprisonment at the state penitentiary for his role in a brawl involving two members of the Sureños gang, the MS-13's rivals. On the day of the incident, the applicant did not go to the mall with the intent to start a brawl; rather, the fight began because his friend, [REDACTED], had problems with one of the Sureños members, [REDACTED]. While he fought one of the Sureños members, unbeknownst to the applicant, [REDACTED] and his other friends stabbed [REDACTED]. In order to avoid a lengthy prison sentence for his role in this offense, the applicant pleaded guilty to malicious wounding.

Because of his criminal offenses, the applicant has been incarcerated since he was [REDACTED] years old. At first, he was held in [REDACTED] with other MS-13 members and associates. When he turned [REDACTED] old, he was transferred to the county prison where he was housed with people he knew from his neighborhood in [REDACTED]. After he was sentenced, he was moved to the state prison, where he was classified as a gang member. Approximately a year into his prison sentence, the applicant [REDACTED].

[REDACTED] he realized he needed to turn his life around.

After the applicant was transferred to the state prison when he was [REDACTED] years old, he stopped associating with the MS-13. He realized that he did not want to be involved in the gang any longer, as he wanted to make his own life choices and did not want to disappoint his family. In order to end his association with the gang, the applicant avoided them by not going into the prison yard, staying in his cell, and attending programs so that they could not retaliate against him. Because the prison has a lot of surveillance and guards, the MS-13 members did not try to harm him for disassociating himself from them. The applicant took responsibility for his past wrongful actions and recognized that his association with the MS-13 were irresponsible and immature. He pledged to continue bettering his life. The applicant has not associated with the MS-13 since being released into immigration custody in [REDACTED] 2020. The applicant has not heard from anyone from his old neighborhood since he stopped associating with the gang. [REDACTED] one of his co-defendants has since been removed to El Salvador.

The applicant has many tattoos on his body, including on his hands, back, torso, and legs. *See* Exh. 3, Tab O. He can cover many of his tattoos, except for those on his hands. The applicant averred that his tattoos are not gang related, as they [REDACTED]. He covered tattoos that said [REDACTED] and [REDACTED] that were on his hands and legs, as they represented [REDACTED].

If the applicant were removed to El Salvador, he fears that the MS-13, 18th Street Gang, Salvadoran authorities, vigilante groups like the exterminos, or G [REDACTED] would seek him out to torture or kill. He worries that the gangs and police would assume he is a gang member because of his tattoos. Gang members always try to find out information about a new person who moves into their territory, including any gang affiliation. The applicant additionally believes that because

[REDACTED]

he is being deported from the United States, gang members would think he has money and try to extort him or his family.

The applicant asserts that Salvadoran authorities would learn of his MS-13 association and gang participation convictions from United States immigration officials or online, as he is classified as a gang member in the detention centers where he was been housed. Once the police learn of his gang ties, they would interrogate or target him. Because the police are corrupt and work with the gangs, they might also hand him over to the gangs to investigate his gang affiliation.

When asked why he cannot explain to the Salvadoran police that he is no longer an MS-13 associate, the applicant testified that they would think he is lying and not protect him. Once they review his criminal history, the police would not believe that he has disassociated himself with the gang. The applicant further contends that the police would also think that he is a gang member because his father was a well-known MS-13 member in [REDACTED] and likely a well-known gang member in El Salvador as well.

The applicant additionally fears that MS-13 members in El Salvador would torture or kill him because he stopped associating with the gang in the United States. He worries that because the gang takes offense to anyone who dissociates from them that they would make an example of him to discourage others from abandoning the gang. When asked if he could rejoin the gang to be safe, the applicant testified that he would not because he does not want to be associated with the gang any longer and wants to make his own life choices.

The applicant further fears the 18th Street Gang would seek to harm or torture him because of his and his father's connections to their rivals, the MS-13. He believes that the 18th Street Gang could easily discover his ties to the MS-13 and gang participation conviction as well as interpret his tattoos as gang related and decide to make an example out of him. He has not had problems with the 18th Street Gang in the United States.

The applicant also believes that Salvadoran civilians would observe his tattoos and report him to the police or gangs. He also fears vigilante groups, like exterminos, because they harass, torture, and kill people they believe to be gang members with impunity. The applicant's uncles were killed in El Salvador because they had tattoos, despite not being gang members. As far as he knows, no one was arrested for their murders.

The applicant additionally fears that upon his father's removal to El Salvador, G [REDACTED] would seek him out to kill in order to enact revenge against the applicant's mother. From prison, G [REDACTED] has recently called the respondent's mother from a cell phone and has been harassing and threatening her. The applicant informed that only well-known or important gang members have access to cell phones in prison. The applicant's mother only answered one of his calls. During their conversation, G [REDACTED] told her that he would wait for the applicant in El Salvador when he is released from prison in the United States.

Upon his removal to El Salvador, the applicant would live with his [REDACTED] whom he does not know. He does not believe that he could relocate within El Salvador to be safe, as the MS-13 or 18th Street Gang control the entire county.

[REDACTED]

2. Testimony of Dr. Robert O. Kirkland, PhD, Expert Witness¹

Dr. Kirkland testified² as follows:

Dr. Kirkland is a retired United States Army officer. In order to work as a Latin American foreign area officer, the United States Army sent him to graduate school at West Point and training at the United States Army School of the Americas. Dr. Kirkland also holds a Master of Arts and Doctor of Philosophy in Latin American History from the University of Pittsburgh and a graduate of the United States Air War College. Currently, he works as an adjunct professor in Los Angeles, California. Since 2000, Dr. Kirkland has specialized in security issues, drug cartels, and gang violence in Central America and Mexico. Dr. Kirkland has written a book regarding drug cartels and gang violence in El Salvador and Mexico as well as several articles on gang violence in El Salvador. He is also involved in professional organizations including the Latin American Studies Association and other scholarly bodies concerning Latin America.

In preparing for the applicant's case, Dr. Kirkland relied on documents from the Congressional Research Service ("CRS"), United States Army, United States Southern Command, and FBI as well as documents from the current administration in El Salvador. Dr. Kirkland is functionally proficient in the Spanish language and last traveled to El Salvador in December 2019. When he travels to El Salvador, he receives a security briefing from colleagues he has worked with in the past who now work in the United States Embassy. Dr. Kirkland interviewed the applicant on the telephone and reviewed the personal statements of the applicant and his mother. Although Dr. Kirkland was paid to write an expert report for the applicant's case, he only takes cases he believes are compelling and show a likelihood that the immigrant is in real danger upon return to their home country. Remuneration does not affect his analysis.

In reviewing this case, Dr. Kirkland believes that upon the applicant's return to El Salvador, four groups would subject him to torture—the MS-13, the Salvadoran government, the 18th Street Gang, and vigilante groups like "exterminos."

Dr. Kirkland believes that the MS-13 would target the applicant due to G [REDACTED]'s ties to the gang and because G [REDACTED] told the applicant that the gang would seek him out if he returns to El Salvador. G [REDACTED] would use his connections and network within the gang in El Salvador to harm the applicant. The MS-13 has a loose hierarchal structure throughout the country and the various cliques communicate and coordinate with each other, which would hamper the applicant's ability to relocate. Although the DHS submitted an article which states that cliques in El Salvador do not communicate with each other, Dr. Kirkland believes that there is much more communication than the author suggests, as the article was written in 2012 and most gang members in El Salvador have cell phones. *See generally* Exh. 5, Tab I. Based on Dr. Kirkland's own knowledge and documents from the FBI and CRS, the MS-13 in El Salvador also communicates with the MS-13 in the United States to an extent. The MS-13 has contacts within the Salvadoran police force who could provide them information about the applicant, including his whereabouts and criminal history.

¹ The DHS did not object to Dr. Kirkland's admission as an expert witness.

² Dr. Kirkland testified telephonically.

[REDACTED]

In addition to the MS-13, Dr. Kirkland further believes that the Salvadoran government would target the applicant because of his affiliation with the MS-13 in the United States. The United States government and the Salvadoran government have an agreement called the Criminal History Information Sharing ("CHIS"), which allows United States officials to alert Salvadoran government officials of deportees who might be a danger to society upon their removal. Through this agreement, Salvadoran authorities would learn of the applicant's criminal record, G [REDACTED]'s ties to the MS-13, and that G [REDACTED] is in the process of being removed. In addition to having his criminal history shared with Salvadoran officials, because he has been associated with the MS-13, the applicant would also be mandated to report to the police on a biweekly basis and provide his address as part of the "717 decree" program. Additionally, in order to obtain a driver's license and access other government services, the applicant would have to obtain a government-issued identification card. To obtain this card, the applicant would have to provide the government his current address, which would allow the police to locate and monitor his movements in the country.

The police would also believe that the applicant is a gang member due to his tattoos, as most Salvadorans avoid tattooing their bodies because tattoos signal gang membership in El Salvador. Since his tattoos would make him stand out, Salvadoran police would likely detain and interrogate the applicant because of the potential danger he could pose to Salvadoran society. When asked if the applicant could tell the police that he has disassociated himself with the gang, Dr. Kirkland testified that it would be unlikely that he would be able to because of his tattoos, gang participation conviction, and G [REDACTED]'s MS-13 membership. It is further unlikely that the police would believe that he has left the gang because it is common for gang members to contend that they have left the gang. However, if the applicant was able to convince the police that he is not a gang member, the police would make a notation in his record and he would no longer have to check in with them about his whereabouts.

Under the current administration, the Salvadoran police and gangs have an even more antagonistic and adversarial relationship than they previously did, as the police have increased arbitrary arrests of gang members in an effort to crack down on gang violence. Numerous outlets and organizations have highlighted the human rights abuses the police commit against gang members or individuals who might have information about gangs, including arbitrarily detaining them and withholding food, water, and sleep from detainees, extrajudicially harming or torturing them, and threatening them with imprisonment. Salvadoran prisons would be dangerous for the applicant, as many MS-13 members are detained. Although there is a formal system to report police abuse, Dr. Kirkland is unsure of the effectiveness of its reporting structure. Dr. Kirkland also does not believe that the Salvadoran government would not protect him from harm, as the police are corrupt.

In addition to harm he would face from the MS-13 and the police, Dr. Kirkland also believes that the applicant faces harm from the 18th Street Gang. The 18th Street Gang tortures and kills rival MS-13 members on the street and especially in the prison system. The 18th Street Gang would believe that the applicant is an MS-13 member because of G [REDACTED]'s membership in the MS-13. Furthermore, like the MS-13, the 18th Street Gang also receives inside information from the Salvadoran police about gang members and associates. Additionally, if the applicant moved to an 18th Street Gang controlled neighborhood in San Miguel, the gang members would seek information about him. Eventually, they would discover his and G [REDACTED]'s MS-13 ties, which would place him in danger.

[REDACTED]

Finally, Dr. Kirkland believes that the applicant faces danger from vigilante groups like exterminos, which have formed to help combat gangs in El Salvador. Based on his tattoos, exterminos would assume that the applicant is a gang member and target him.

Usulután, where the applicant plans to return upon his removal, has a significant level of gang activity and the second highest rate of homicide in El Salvador, according to data from the United States Embassy in San Salvador. Usulután has a high homicide rate because it is a border area and neither the MS-13 nor the 18th Street Gang have a stronghold there.

Dr. Kirkland believes that the applicant would more likely than not be tortured upon his removal because of his visible tattoos, criminal record, past association with the MS-13, G [REDACTED]'s membership in MS-13, and the Salvadoran government's crackdown on gang members. The applicant cannot relocate within El Salvador, as it is a small country. Because of all these factors, the applicant is at a greater risk of harm or torture than other returning deportees.

3. Testimony of Y [REDACTED] R [REDACTED], Witness

[REDACTED] testified as follows:

Y [REDACTED] is the applicant's mother. She averred that the applicant is not a gang member but spent time with the gang.

The applicant's father, G [REDACTED], is an MS-13 gang leader. Y [REDACTED] knows he is a gang leader because he [REDACTED] and forced her to be in a relationship with him. [REDACTED] she heard him talk about gang activities and give commands to other gang members. Aside from forcing her to be in a relationship with him, throughout their relationship, [REDACTED]

In 2005, G [REDACTED] and Y [REDACTED] separated. Following their separation, G [REDACTED] did not have any contact with Y [REDACTED] until he called her three months ago. During this conversation, G [REDACTED] asked if the applicant was going to be removed to El Salvador; Y [REDACTED] understood G [REDACTED]'s question to mean that upon the applicant's return, he would send gang members to force the applicant to join the gang. If the applicant refuses to join, Y [REDACTED] believes that G [REDACTED] would order the gang to kill the applicant, as G [REDACTED] threatened to harm her mother [REDACTED]. Y [REDACTED] refused to give G [REDACTED] any information about the applicant's immigration case and demanded that he stop contacting her and her children.

Neither gang members nor others in El Salvador have threatened Y [REDACTED]. However, two or three years ago, gang members killed a few of her family members because they refused to join the gang.

III. LAW, ANALYSIS, AND FINDINGS

The Court has considered the entire record carefully and given all evidence and testimony the appropriate weight, even if not specifically addressed in the decision. *See generally Alvarez Lagos v. Barr*, 927 F.3d 236, 251 (4th Cir. 2019); *Orellana v. Barr*, 925 F.3d 145, 153 (4th Cir. 2019).

A. Credibility and Corroboration

1. Legal Standard

As a threshold matter, when the applicant offers testimonial evidence to support an application for relief, the Court must assess his credibility. *See* INA § 240(c)(4)(B); *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998). Applications for relief filed after May 11, 2005 are subject to the REAL ID Act provisions. *See* REAL ID Act, Pub.L. 109-13, 119 Stat. 302 (2005); *see also Matter of S-B-*, 24 I&N Dec. 42, 42-43 (BIA 2006). The REAL ID Act specifically amended INA § 208 and placed all of the burdens of proof on the applicant. INA § 240(c)(4). Specifically, the applicant must establish that he satisfies the applicable eligibility requirements and that he merits a favorable exercise of discretion for relief.

In making a credibility determination, the Court considers the totality of the circumstances and all relevant factors. *See* INA § 240(c)(4)(C); *see also Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007). Generally, a witness must provide detailed, plausible, and consistent testimony. *See* INA § 240(c)(4)(B)-(C). The Court may base a credibility determination on a witness's demeanor, candor, or responsiveness, and the inherent plausibility of his account. *See* INA § 240(c)(4)(C). The Court may also consider the consistency between a witness's written and oral statements; the internal consistency of each such statement; the consistency of such statements with other evidence of record; 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. *See id.*; *see also Qing Hua Lin v. Holder*, 736 F.3d 343, 351 (4th Cir. 2013). The Court may also consider "any other relevant factor" when assessing credibility. *See* INA § 240(c)(4)(C).

To be credible, the witness's testimony should satisfactorily explain any material discrepancies or omissions. *See* INA § 240(c)(4)(C). While minor and isolated discrepancies need not be fatal to credibility, omission of key events coupled with numerous inconsistencies may lead to a finding that the applicant is not credible. *See Matter of A-S-*, 21 I&N Dec. 1106, 1109-10 (BIA 1998). Testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable. *See Djadjou v. Holder*, 662 F.3d 265 (4th Cir. 2011); *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997). An adverse credibility finding can also be based on fraudulent documents. *See O-D-*, 21 I&N Dec. at 1079.

An applicant's own testimony, without corroborating evidence, may be sufficient proof to support an application if that testimony is believable, consistent, and detailed enough to provide a plausible and coherent account of the basis for his or her fear of persecution. *See Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987); 8 C.F.R. § 1208.13(a); *see also J-Y-C-*, 24 I&N Dec. at 263. Under the REAL ID Act of 2005, if the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the

[REDACTED]

applicant does not have it and cannot reasonably obtain it. *See* INA § 208(b)(1)(B)(ii); *see also Singh v. Holder*, 699 F.3d 321 (4th Cir. 2012); *S-M-J*, 21 I&N Dec. at 725.

2. Analysis

a. The Applicant

Based on a review of the entire record, the Court finds that the applicant testified credibly. His testimony was plausible, detailed, internally consistent, and consistent with his Form I-589, his declaration, and his mother's testimony and affidavit. *See generally* Exh. 2, pp. 5-8; Exh. 3, Tabs A-B. The applicant was also forthcoming regarding his association with the MS-13 and his criminal record. Thus, the Court finds the applicant credible.

b. Dr. Robert O. Kirkland, PhD, Expert Witness

The Court finds that Dr. Kirkland testified credibly and gives his testimony full weight and consideration.

c. Y [REDACTED] R [REDACTED], Witness

The Court finds Y [REDACTED] credible, as she answered the parties' questions truthfully and did not attempt to mislead the Court. As such, the Court finds Y [REDACTED] to be a credible witness.

B. Particularly Serious Crime

1. Legal Standard

An alien who has been convicted of a particularly serious crime is ineligible for asylum and for withholding of removal. *See* INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B)(ii) 8 C.F.R. § 1208.16(c)(4), (d)(2). The Court need not separately determine whether the applicant is a danger to the community because a person who has been convicted of a particularly serious crime shall be considered a danger to the community. *See* INA § 208(b)(2)(A)(ii); *see also Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995); *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007) (holding said proposition in the context of a withholding of removal analysis). In the context of asylum, all aggravated felonies are *per se* particularly serious crimes. *See* INA § 208(b)(2)(B)(i). The bar to withholding of removal for conviction for a particularly serious crime is not identical to the bar in the asylum context. For withholding of removal, an alien has been *per se* convicted of a particularly serious crime if he or she has been convicted of one or more aggravated felonies that result in an aggregate prison sentence of at least five years. *See* INA § 241(b)(3)(B)(iv).

However, crimes that are not aggravated felonies or fall short of the minimum five-year sentence may be a particularly serious crime and must be adjudicated on a case-by-case basis. In such cases, the Court considers whether the elements of an offense are particularly serious on their face or whether they potentially bring an offense within the ambit of a particularly serious crime. *See N-A-M-*, 24 I&N Dec. at 342 (citing *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986)). "If the elements of the offense do not potentially bring the crime into a category of particularly serious

[REDACTED]

crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal.” *Id.* Likewise, if the elements are found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records, sentencing information, and other information outside the confines of the conviction record including the facts and circumstances underlying the conviction. *See id.* (citing *Matter of L-S-*, 22 I&N Dec. 645, 654-56 (BIA 1999)); *see also Gao v. Holder*, 595 F.3d 549 (4th Cir. 2010); *Yousefi v. INS*, 260 F.3d 318, 329 (4th Cir. 2001) (citing *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982)); *Matter of M-H-*, 26 I&N Dec. 46, 50 (BIA 2012). The Board of Immigration Appeals (“Board”) has also held that the extent of harm the victim suffered is a “pertinent factor” in the analysis, as is whether the nature of the crime suggests that the alien represents a danger to the community. *See Matter of G-G-S-*, 26 I&N Dec. 339, 343 (BIA 2014); *Matter of Carballe*, 19 I&N Dec. 357, 360 (BIA 1986).

2. Analysis

On June 12, 2014, the applicant was convicted of felony Malicious Wounding in violation of Va. Code Ann. § 18.2-51 and [REDACTED]

[REDACTED] For the Malicious Wounding conviction, he was sentenced to ten years’ imprisonment with six years suspended. *Id.* at 63-64, 67. For the [REDACTED]

In its brief, the DHS contends that the applicant’s convictions for Abduction³ and Malicious Wounding are categorically aggravated felony under INA § 101(a)(43)(F) as defined in 18 U.S.C. § 16(a) and § 16(b).⁴ *See generally DHS’s Brief on Particularly Serious Crime (“DHS’s Brief”).*⁵ The DHS further asserts that because such convictions are categorical aggravated felonies, the applicant is barred from withholding of removal, as his convictions constitute particularly serious crimes. *Id.* The applicant, through counsel, argues that such convictions are not aggravated felonies. *See Applicant’s Brief on Eligibility*, pp. 2-5. In particular, the applicant asserts that his malicious wounding conviction is not a categorical aggravated felony crime of violence because the statute can be violated without the use or threat of force as required under 18 U.S.C. § 16(a). *Id.* at 3.

The Court now considers the parties’ arguments and briefs in determining whether the applicant is ineligible for withholding of removal under the particularly serious crime bar.

a. Aggravated Felony Crime of Violence

To determine whether a criminal conviction constitutes an aggravated felony under INA § 237(a)(2)(A)(iii), the Court applies a categorical approach that analyzes whether the minimum conduct punishable under the statute categorically fits within the generic federal definition of the

³ Because the Court finds that the applicant’s conviction for malicious wounding is an aggravated felony, it need not reach whether his conviction for abduction is also an aggravated felony.

⁴ As discussed above, because the Supreme Court determined that 18 U.S.C. § 16(b) is unconstitutionally vague, the Court need only analyze the statute of conviction under § 16(a). *See Dimaya*, 138 U.S. 1204 (2018).

⁵ The Court notes that the DHS’s brief lacks pagination.

corresponding aggravated felony. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). Under the categorical approach, the Court must look only to the elements of the offense, and not to the underlying facts of the case. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Where a statute defines multiple crimes by listing various, alternative elements, the modified categorical approach is applied, which permits a court to look at a limited class of documents from the record of conviction. *Id.* at 2245-46 (citing *Shepard v. United States*, 544 U.S. 13, 16 (2005)).⁶

An “aggravated felony” is defined in INA § 101(a)(43)(F) as a crime of violence under 18 U.S.C. § 16, for which the term of imprisonment is at least one year. 18 U.S.C. § 16 defines a crime of violence as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Supreme Court has held that § 16(b) is unconstitutionally vague. *See Sessions v. Dimaya*, 138 U.S. 1204 (2018). Accordingly, the Court need only consider whether the applicant’s conviction is a crime of violence under § 16(a). In *Matter of Guzman-Polanco*, the Board clarified that a statute must require as an element violent, physical force for purposes of § 16(a). 26 I&N Dec. 713 (BIA 2016). The Supreme Court has explained that “‘physical force’ means *violent* force— that is, force capable of causing physical pain or injury to another.” *See Johnson v. United States*, 559 U.S. 133, 140 (2010). The Supreme Court has also cautioned that § 16(a) requires a “higher degree of intent than negligent or merely accidental conduct.” *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *see also Matter of Chairez (“Chairez III”)*, 26 I&N Dec. 819, 822 n.4 (BIA 2016) (finding recklessness to be an insufficient mens rea under Tenth Circuit precedent).

The malicious wounding statute at Va. Code Ann. § 18.2-51 states, “If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.”

Recently, the Fourth Circuit determined that in the context of the Armed Career Criminal Act (“ACCA”) sentencing enhancement, the offense of malicious wounding in violation of Va. Code Ann. § 18.2-51 is a violent felony under 18 U.S.C. § 924(e)(2)(B)(i) because it categorically involves the required “use of physical force.” *See United States v. Rumley*, 952 F.3d 538, 550 (4th Cir. 2020). The “use of physical force” includes force applied directly or indirectly. *See id.* at 549 (citing *United States v. Castleman*, 572 U.S. 157, 170-71 (2014); *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017)). The Fourth Circuit thus held that the minimum conduct necessary under the Virginia statute requires (1) causation of bodily injury and (2) that the person causing such injury acts with specific intent to “cause severe and permanent injury—maiming, disfigurement, permanent disability, or death,” which categorically involves the sufficient use of physical force

⁶ Such documents include the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard*, 544 U.S. at 16.

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under the ACCA. *Rumley*, 952 F.3d at 550. Shortly after the *Rumley* decision was issued, the Fourth Circuit denied a petition for review wherein the petitioner challenged the Immigration Judge's finding that his malicious wounding conviction was a crime of violence as defined in 18 U.S.C. § 16(a). *See Rose v. Barr*, 799 F. App'x 218, 218-19 (2020) (citing *Rumley*, 952 F.3d at 550; *United States v. Jenkins*, 719 F. App'x 241, 244-46 (4th Cir. 2018) (unpublished); *United States v. James*, 718 F. App'x 201, 204 (4th Cir. 2018) (unpublished)) (unpublished).

A violent felony under the ACCA is one that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). As the ACCA's violent felony clause pursuant to 18 U.S.C. § 924(e)(2)(B)(i) is analogous to 18 U.S.C. § 16(a), the Court now finds that malicious wounding is a categorical aggravated felony crime of violence as defined in 18 U.S.C. § 16(a). *Compare id. with* 18 U.S.C. § 16(a). Thus, the Court finds that the applicant's conviction for malicious wounding is an aggravated felony crime of violence under INA § 101(a)(43)(F).

Because the Court has determined that the applicant's malicious wounding conviction is an aggravated felony crime of violence and he was sentenced to ten years' imprisonment, the Court finds that the applicant's conviction is a *per se* particularly serious crime. *See* INA § 241(b)(3)(B)(iv); 8 C.F.R. § 1208.13(c). The Court further finds that the applicant is barred from withholding of removal under the Act and under the CAT. *See* INA § 241(b)(3)(B); 8 C.F.R. § 1208.16(d)(2). As such, the Court finds that the applicant is only eligible for deferral of removal under the CAT. *See Matter of G-A-*, 23 I&N Dec. 366, 368 (BIA 2002); 8 C.F.R. § 1208.17(a).

C. Withholding of Removal under INA § 241(b)(3)

1. Legal Standard

To be granted withholding of removal under the Act, the applicant must demonstrate that, if returned to his country, his life or freedom would be threatened on account of his race, religion, nationality, political opinion, or membership in a particular social group. INA § 241(b)(3). To make this showing, the applicant must establish either that (1) he experienced past persecution on account of a protected ground or (2) it is "more likely than not" that he would be subjected to persecution on account of a protected ground if he were to return to the country from which he seeks withholding of removal. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *INS v. Stevic*, 467 U.S. 407, 429 (1984); 8 C.F.R. § 1208.16(b)(1)-(2). Furthermore, a withholding applicant must establish that one of the five protected grounds was or will be at least "one central reason" for the persecution. INA § 208(b)(1)(B); INA § 241(b)(3)(A); *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010). Finally, the applicant must demonstrate that the persecution was or will be committed by the government or by forces that the government is unable or unwilling to control. *See Crespin-Valladares v. Holder*, 632 F.3d at 117, 128 (4th Cir. 2011); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). There is no discretionary element; if the applicant establishes eligibility, withholding of removal must be granted. *INS v. Ventura*, 537 U.S. 12, 13 (2002).

A threat to life or freedom is the equivalent of persecution. *See Lizama v. Holder*, 629 F.3d 440, 446 n.3 (4th Cir. 2011) (explaining relief under withholding of removal is based on persecution). Persecution constitutes a requisite degree of harm that rises above "mere harassment." *See Li v.*

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Gonzales, 405 F.3d 171, 177 (4th Cir. 2005); see also *Acosta*, 19 I&N Dec. at 222. Persecution is “an extreme concept that does not include every sort of treatment our society regards as offensive.” See *Li*, 405 F.3d at 177 (citation and internal quotation marks omitted). The Fourth Circuit has expressly held that “the threat of death qualifies as persecution.” See *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (quoting *Crespin-Valladares*, 632 F.3d at 126). However, a death threat may not always rise to the level of persecution if it is too “distant,” “unspecific,” or remote in time and place. See *Cortez-Mendez v. Whitaker*, 912 F.3d 205, 209 n.* (4th Cir. 2019). Threats and harm are considered “in the aggregate” to determine whether an applicant has suffered past harm that rises to the level of persecution. See *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998).

2. Analysis

In the alternative, even if the applicant were eligible for withholding of removal, as discussed below, the Court would still deny his claim.

The applicant, through counsel, contends that he has a well-founded fear of persecution on account of his membership in two particular social groups consisting of (1) “former members of MS-13” and (2) “former members of MS-13 who left for moral reasons.” See *Applicant’s Brief in Support of Form I-589*, pp. 10-17.

An applicant for withholding of removal who is seeking relief based on his membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. See *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (citing *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008)). An applicant must also show that this group membership was the motivation behind the persecution, and that the particular social group “exists independently of harm asserted in an application for asylum.” See *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); see also *Matter of R-A-*, 22 I&N Dec. 906, 925-26 (BIA 1999).

The Fourth Circuit has determined that a particular social group of “former MS-13 members from El Salvador” is immutable because the only way to change membership in said group is to rejoin the gang. See *Martinez v. Holder*, 740 F.3d 902, 911 (4th Cir. 2014). The Fourth Circuit further found that rejoining the gang would contradict a “critical aspect of his conscience” that the applicant should not be forced to change. *Id.* at 912. The Board, however, has established that the particular social group consisting of “former gang members” is not sufficiently particular or distinct to constitute a cognizable particular social group. See *Matter of W-G-R-*, 26 I&N Dec. 208, 221-23 (BIA 2014) (holding that “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” does not constitute a particular social group as it is not sufficiently particular or distinct). The Board further found that the record contained “scant evidence that Salvadoran society considers former gang members who have renounced their gang membership as a distinct social group.” *Id.* at 222.

In considering the applicant’s proposed particular social groups, the Court cannot find that either articulated group is sufficiently particular. The Board has held that the “‘particularity’ requirement relates to the group’s boundaries or, as earlier court decisions described it, the need to put ‘outer

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limits' on the definition of a 'particular social group.'" See *M-E-V-G-*, 26 I&N Dec. at 238. Particular social groups must be defined by concrete characteristics that provide a "clear benchmark for determining who falls within the group," and who does not. *Id.* at 239. Particularity ensures that the group be "discrete," with "definable boundaries," such that it is not "amorphous, overbroad, diffuse, or subjective." *Id.*

The applicant argues that his proposed social groups are sufficiently particular because the DHS's evidence states that there are approximately 60,000 to 65,000 MS-13 and 18th Street Gang members in El Salvador and even less individuals who have left the gangs. See *Applicant's Brief*, p. 13 (citing Exh. 5, Tab W, p. 246; *id.*, Tab Y, p. 266). The applicant provided insufficient objective evidence to indicate with any certainty the amount of individuals who have defected from the MS-13 in El Salvador or why such individuals may have renounced their membership in the gang. Considering that it is unknown how many individuals have left the gang for moral or other reasons, the Court finds that the applicant's articulated social groups are amorphous and overbroad. See *M-E-V-G-*, 26 I&N Dec. at 239; see also *W-G-R-*, 26 I&N Dec. at 222.

The Court further finds that the applicant's claimed social groups lack social distinction, which considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. See *M-E-V-G-*, 26 I&N Dec. at 238. Social distinction requires that a viable particular social group be perceived within the given society as a sufficiently distinct group. *Id.* A particular social group for asylum purposes requires that the society in question view the group as separate and distinct. *Id.*

Similar to *W-G-R-*, the record contains insufficient objective evidence that Salvadoran society recognizes former MS-13 members or former MS-13 members who left for the gang for moral reasons as distinct social groups. See 26 I&N Dec. at 222. The applicant provided letters from his cousins indicating that upon his removal to El Salvador, others in the neighborhood would ostracize him due to his tattoos and as someone who was deported from the United States. See Exh. 3, Tab J, p. 35; *id.*, Tab K, p. 40; *id.*, Tab L, p. 45. Although the applicant contends that his cousins' views are representative of how Salvadoran society treats returning deportees, he did not submit any objective evidence to support this assertion aside from his family members' letters. He also submitted an article highlighting a pilot program in the Salvadoran jail system that rehabilitates former gang members; however, because such pilot program is only available to incarcerated former gang members, it is unlikely that Salvadoran society is widely aware of such program. After considering all the evidence of record, the Court cannot find that the applicant provided sufficient objective evidence to demonstrate that "former members of MS-13" or "former members of MS-13 who leave for moral reasons" would be recognized in Salvadoran society as a distinct group. See *M-E-V-G-*, 26 I&N Dec. at 238; *W-G-R-*, 26 I&N Dec. at 222.

Even if his particular social groups were cognizable, the Court cannot find that the applicant is a member of either of his articulated groups. Both the applicant and his mother testified that he was not an MS-13 member; rather, he averred that he was only a gang associate. Considering that he did not consider himself an MS-13 member, the Court cannot find that he would fit within either of his articulated social groups.

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Additionally, even if the applicant had proposed an alternative social group such as “former members or associates of MS-13,” the Court would continue to find that his group is not cognizable because it is not sufficiently particular or socially distinct. The applicant testified that he was never a full member of the MS-13 but rather only an associate, as he was never jumped in to the gang, and did not attend gang meetings or have a voice in the gang. He explained that as an associate, he performed errands at the gang’s behest and spent time with his childhood friends, who were members and other associates. Considering that the applicant failed to provide any objective evidence indicating how many individuals are gang associates in El Salvador, the Court cannot find that such alternative formulation of his social groups would likewise be cognizable under case law. *See id.*

Because the applicant has not provided evidence that his articulated particular social groups are either sufficiently particular or socially distinct in Salvadoran society, the Court is unable to find that the applicant’s proposed social groups are cognizable within the meaning of *M-E-V-G-*. *See* 26 I&N Dec. at 227. Thus, the Court cannot find that the applicant would be persecuted on account of his membership in either of his articulated particular social groups if he were removed to El Salvador. Accordingly, the Court finds that the applicant has not met his burden of establishing a claim for withholding of removal under the Act and denies his application.

D. Protection under the Convention Against Torture (“CAT”)

1. Legal Standard

An applicant for relief under the CAT must show it is more likely than not he will be subjected to torture in the country of removal by, at the instigation of, or with the acquiescence of a public official or one acting in an official capacity. *See generally* 8 C.F.R. §§ 1208.16-.18. Torture is any act that (1) causes severe physical or mental pain or suffering; (2) is intentionally inflicted; (3) is inflicted for a proscribed purpose; (4) is inflicted by, at the instigation of, or with the consent or acquiescence of a public official or one acting in an official capacity who has custody or physical control of the victim; and (5) does not arise from lawful sanctions. *See Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002); *see also* 8 C.F.R. § 1208.18(a). To prove acquiescence, an applicant must do more than show that the government is powerless to stop the torture. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240-41 (4th Cir. 2004). Acquiescence requires that a public official have prior awareness of the torturous activity and thereafter breach his legal responsibility to intervene to prevent such activity. *See Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 971 (4th Cir. 2019). This includes not only actual knowledge of torture, but also “‘willful blindness’ or ‘turn[ing] a blind eye to torture.’” *Id.* (quoting *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245 (4th Cir. 2013)).

The Court should assess the aggregate risk of torture from all sources when determining whether the applicant is more likely than not to be tortured in the relevant country. *Id.* at 972-73. When determining whether an applicant has met his burden of proof, the Court will consider all relevant evidence, including but not limited to: (1) evidence of the applicant’s past torture, (2) evidence that the applicant could relocate to another part of the country where he is not likely to be tortured, (3) evidence of “gross, flagrant or mass violations of human rights” in the country, and (4) other country conditions information. 8 C.F.R. § 1208.16(c)(3). However, a pattern of human rights violations alone is not sufficient to show that a particular person would be in danger of being

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subjected to torture upon his return to that country. *See Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000). An applicant cannot establish eligibility for CAT protection merely by stringing together a series of suppositions. *See Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006).

2. Analysis

The applicant fears that if he were removed to El Salvador, the MS-13, 18th Street Gang, Salvadoran police, vigilante groups like the exterminos, or his father, G [REDACTED], would seek to torture or kill him because of his tattoos, his past association with the MS-13, and G [REDACTED]'s status as a gang leader. He further fears that the Salvadoran government would acquiesce to his torture. The applicant does not believe that there is anywhere in El Salvador where he could be safe. In considering the applicant's claim, the Court must assess his aggregate risk of torture from all sources and determine whether such torture would be at the instigation of, or with the acquiescence of a public official or one acting in an official capacity. *See Rodriguez-Arias*, 915 F.3d at 971-73; 8 C.F.R. §§ 1208.16-18.

The Court finds that if he were returned to El Salvador, the applicant faces the threat of torture from the Salvadoran police. His expert witness, Dr. Kirkland, informed that the United States government shares information about returning deportees' criminal histories with the Salvadoran government through the CHIS agreement. *See Exh. 3, Tab D*, pp. 20-21, ¶¶ 35-38. Through this agreement, the Salvadoran police would learn of the applicant's gang participation conviction and prior gang-association as well as receive his biometric information like photographs and fingerprints. *See Exh. 3, Tab D*, p. 21, ¶ 37. Consequently, through the 717 decree program, the police would require him to provide his address as well as attend biweekly check-ins as a deportee identified as being affiliated with a gang. *See Exh. 3, Tab D*, p. 19, ¶ 28; *see generally Exh. 3, Tab R*, pp. 111-20. The Salvadoran government would also be alerted to G [REDACTED]'s ties to the MS-13 and his pending removal. *See Exh. 3, Tab I*. In addition to being provided his criminal history and gang ties, the Salvadoran police would also identify the applicant as a gang member because of his tattoos and likely detain and interrogate him as a result. Dr. Kirkland informed that while the applicant could attempt to explain to the police that he has renounced his MS-13 ties, individuals accused of being affiliated with a gang often tell the police that they have left the gang. Thus, it is unlikely that the police would believe him, as they would be aware of his gang participation conviction, tattoos, and his father's MS-13 membership.

Furthermore, the current Salvadoran administration has an even more antagonistic relationship with the gangs than prior administrations. In order to curb gang violence, the police often use excessive force and commit human rights abuses, including arbitrary arrests and detention, wrongful imprisonment based on erroneous gang affiliation, deprivation of food, water, and sleep, physical abuse, disappearance, and extrajudicial execution. *See Exh. 3, Tab D*, p. 19, ¶¶ 29-30; *Exh. 3, Tab V*, p. 215. Given the applicant's criminal history, MS-13 association, and tattoos, Dr. Kirkland believes that the Salvadoran police would likely target the applicant and arrest and detain him rather than protect him. *See Exh. 3, Tab D*, p. 19, ¶¶ 29-30. Considering all these factors, the applicant has established that he would more likely than not face torture at the hands of the Salvadoran police upon his return.

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Dr. Kirkland's affidavit further states that the former President and the Salvadoran Attorney General have admitted that organized groups have infiltrated various government ministries." See Exh. 3, Tab D, p. 14, ¶ 9. His affidavit elaborates that individuals can bribe government or law enforcement officers to obtain addresses or other information about individuals from government databases. See Exh. 3, Tab D, pp. 21-22, ¶¶ 40-41. In order to function in Salvadoran society, individuals must possess an identification document to apply for a job, open a bank account, or vote. See Exh. 3, Tab D, pp. 21-22, ¶¶ 40-41. To obtain such identification document, individuals must provide their addresses. *Id.* Considering that the applicant's criminal history, prior gang affiliation, current address, and biometrics information would be stored and available in multiple government databases and authorities have been bribed for information, it is likely that others wishing to harm him could pay corrupt government officials to access such information in order to harm or kill him. See Exh. 3, Tab D, pp. 14, 19, 21-22, ¶¶ 9, 28, 37, 40-41.

In addition to the threat he faces from the Salvadoran police, the applicant also faces a risk from the MS-13. Dr. Kirkland believes that the MS-13 would target the applicant because of G [REDACTED]'s ties to the gang and because G [REDACTED] told the applicant's mother that the gang would seek him out if he returns to El Salvador.

The applicant's mother, Y [REDACTED], credibly testified that G [REDACTED] is an MS-13 leader and that she heard him give commands to other members in El Salvador. See Exh. 3, Tab B, p. 4, ¶ 6. [REDACTED]. For the past several months, he has been calling her; on the one occasion Y [REDACTED] answered the phone, G [REDACTED] asked if the applicant was being removed to El Salvador. Y [REDACTED] understood G [REDACTED]'s words to mean that he would send gang members to force the applicant to join the MS-13. See Exh. 3, Tab B, p. 4, ¶ 3; Exh. 3, Tab C, p. 10. Y [REDACTED] believes that G [REDACTED] would order the applicant to be tortured or killed if he refuses to join the gang. Additionally, three of Y [REDACTED]'s [REDACTED] were murdered in El Salvador for refusing to join the gang; all of them had non-gang-related tattoos. See Exh. 3, Tab C, p. 7, ¶ 26; *see also id.*, Tab M, pp. 49, 52, 55.

Dr. Kirkland asserts that G [REDACTED] would be able to use his connections and network within the MS-13 in El Salvador to torture the applicant. The MS-13 has a loose hierarchal structure as different cliques communicate and coordinate with each other in El Salvador, and to a lesser extent, with the MS-13 in the United States. See Exh. 5, Tab I, p. 42 (stating that the ties between cliques in different countries are "based on personal connections"). As discussed above, the MS-13 has contacts within the Salvadoran police force who can provide them information about the applicant, including his whereabouts, criminal history, prior gang association, and biometrics, which would help them locate him. Considering that Y [REDACTED] testified that she heard G [REDACTED] command other MS-13 members and that he asked her if the applicant would be removed to El Salvador, it is plausible that G [REDACTED] could order MS-13 members to locate the applicant and either force him to join the gang or torture or kill him if he refuses. The MS-13 could also learn of the applicant's prior gang association through their contacts with government officials or suspect he is a gang member based on his tattoos and demand that he rejoin the gang. If he refuses to join or the MS-13 becomes aware that he was associated with the gang but has since renounced such association, the M-13 would likely torture him. Additionally, if the police arbitrary detain the applicant as a suspected gang member or for any other reason, it is likely that MS-13 members who fill the Salvadoran prison system would torture or kill him once he refuses to join or they find out that he

[REDACTED]

has renounced his gang association. *See* Exh. 3, Tab D, p. 19, ¶ 30; *see also* Exh. 3, Tab V, p. 219-20. Thus, the applicant has demonstrated that he would more likely than not face torture at the hands of the MS-13 upon his return.

In addition to the threat of torture he faces from the Salvadoran police and the MS-13, the applicant also faces the threat of torture from the 18th Street Gang. Like the MS-13, the 18th Street Gang also has individuals who have infiltrated government positions who could provide them information about the applicant's association with the MS-13, criminal history, whereabouts, and biometrics information. *See* Exh. 3, Tab D, pp. 14, 19, 21-22, ¶¶ 9, 28, 37, 40-41. If the applicant moved to an 18th Street Gang territory and they learned of his association with the MS-13 or suspected that he was an MS-13 due to his tattoos or G [REDACTED]'s position as an MS-13 gang leader, the 18th Street Gang would likely seek to torture or kill him. *See* Exh. 3, Tab V, pp. 227-28.

The threats the gangs pose to the applicant are consistent with country conditions evidence demonstrating widespread gang violence in El Salvador. The 2019 Department of State Human Rights Report ("2019 DOS Report") states that "organized criminal elements, including transnational gangs . . . , were significant perpetrators of violent crimes and committed acts of murder, extortion, kidnapping, human trafficking, intimidation, and other threats and violence . . ." *Id.* at 215. Upon his removal, the applicant plans to return to Usulután to reside—Usulután has the second highest homicide rate in El Salvador, as it is a border area and neither the MS-13 nor the 18th Street Gang have a stronghold there. *See* Exh. 7, Tab D, pp. 17-18, ¶¶ 23-24. Considering that the MS-13 and 18th Street Gang operate in Usulután and have reason to seek to torture or kill him, the applicant has demonstrated that he would more likely than not face torture from the gangs upon his return. *See Rodriguez-Arias*, 915 F.3d at 972-73; 8 C.F.R. § 1208.16(c)(3).

Finally, the applicant also faces threat of torture from vigilante groups like exterminos. Such groups have developed to help combat gangs in El Salvador; however, they often target anyone they believe to be a gang member. The 2019 DOS Report indicates that in September 2018, twenty-two members of an alleged extermination group operating in San Miguel and Usulután were arrested for killing more than fifty gang members and their associates as well as committing other numerous crimes in 2016 and 2017. *See* Exh. 3, Tab V, p. 216. The 2019 DOS Report further states that the extermination group consisted of forty-five members, including fourteen active-duty national police officers (of which only eleven were arrested) and four former national police officers. *Id.* Although the Court recognizes that some individuals were eventually arrested for their crimes, they were still able to commit killings of gang members and associates extrajudicially for several years prior to being arrested. *Id.* After considering all the evidence and circumstances, because he has tattoos and present and former police officers could likely access government systems that contain information regarding his criminal history and gang ties, exterminos would be able to learn that the applicant is a prior gang associate and more likely than not target him for torture or death. *See Rodriguez-Arias*, 915 F.3d at 972-73; 8 C.F.R. § 1208.16(c)(3).

After considering his risk of torture from all potential sources in the aggregate, including the Salvadoran police, MS-13, 18th Street Gang, exterminos, and G [REDACTED], the Court finds that the applicant has met his burden in demonstrating that he would more likely than not be tortured or killed if he were removed to El Salvador. *See Rodriguez-Arias*, 915 F.3d at 972-73; 8 C.F.R. § 1208.16(c)(3).

[REDACTED]

The Court must additionally consider whether the applicant can demonstrate that the torture to which he would more likely than not be subjected would be at the instigation of, or with the acquiescence of a Salvadoran public official or one acting in an official capacity. *See Rodriguez-Arias*, 915 F.3d at 971; *see generally* 8 C.F.R. §§ 1208.16-.18.

The evidence of record demonstrates that the Salvadoran government has implemented an aggressive, oftentimes violent approach involving the excessive use of force to combat gang violence. *See* Exh. 3, Tab V, p. 215; Exh. 3, Tab D, p. 19, ¶¶ 29-30. Because of these measures, known and suspected gang members are routinely subjected to serious human rights abuses, including torture, death, and disappearance at Salvadoran law enforcement officers' hands. *See id.* For instance, the 2019 DOS Report indicates that there were one hundred sixteen incidents of security force involvement in extrajudicial killings of suspected gang members from 2014 through 2018. *See* Exh. 3, Tab V, p. 216. Like the applicant, most victims were male and nearly half were between the ages of eighteen and twenty-four years old. *Id.* The widespread nature of police brutality in El Salvador demonstrates that the violent targeting of suspected gang members is not the conduct of a few rogue government actors. Rather, it is indicative of Salvadoran officials' willful blindness to torture perpetrated by actors within their own government.

Additionally, as mentioned above, high-ranking Salvadoran government officials have acknowledged that gang members have infiltrated government agencies. *See* Exh. 3, Tab D, p. 14, ¶ 9. Dr. Kirkland further testified that gangs, including both the MS-13 and 18th Street Gang, bribe officials for information contained within government databases. *See* Exh. 3, Tab D, pp. 21-22, ¶¶ 40-41. Furthermore, the current Salvadoran President has indicated that the gangs "are political actors who need[] to be included in the political process." *See* Exh. 3, Tab D, p. 15, ¶ 13. Considering these factors, the applicant has established that any torture the Salvadoran police or other officials subjected him to would more likely than not be perpetrated by, or with the acquiescence of the Salvadoran government.

The applicant's particular risk factors also make it more likely than not that a Salvadoran public official would acquiesce to his torture at the hands of the Salvadoran police, MS-13, 18th Street Gang, exterminos, and his [REDACTED]. Widespread government corruption, arbitrary arrest and detention, and allegations of unlawful killings of suspected gang members pervade the Salvadoran police force. *See* Exh. 3, Tab V, p. 215. Moreover, impunity for public officials who commit abuses persists despite government steps to address corruption. *See id.* at 215, 223, 230. This objective evidence alone suggests a significant likelihood that a Salvadoran public official would acquiesce to the applicant's torture even absent his particular risk factors. However, the applicant's criminal history, prior MS-13 association, and tattoos that would all become known to Salvadoran officials and be accessible in government databases, which exacerbates the risk that a Salvadoran public official would acquiesce to his feared torture at the hands of all the actors who would seek to torture or kill him.

Government acquiescence is a significant hurdle, as acquiescence requires that the applicant do more than show that the government is powerless to stop the torture. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 240-41 (4th Cir. 2004); *Suarez-Valenzuela*, 714 F.3d at 246. The Court acknowledges that the DHS presented evidence showing that the Salvadoran government has taken

[REDACTED]

some steps to address gang violence and corruption in the country. *See generally* Exh. 4, Tabs B-F, H (noting the declining murder rate and detention of some gang members). The 2019 DOS Report further emphasizes some of the efforts the Salvadoran government has made. *See* Exh. 5, Tab V, pp. 215-19, 225, 228 (discussing efforts to investigate and prosecute police corruption, extrajudicial killings, and gang activity). However, in considering the country conditions evidence as a whole, particularly with respect to his specific risk factors, the applicant has overcome the acquiescence hurdle. *See Lopez-Soto*, 383 F.3d at 240-41.

The evidence of record further establishes that the applicant would not be able to safely relocate within El Salvador to avoid the risk of torture. The 2019 DOS Report highlights the extensive network and widespread brutality of the MS-13 and 18th Street gangs as well as the significant human rights issues for individuals suspected to be gang members. *See* Exh. 3, Tab V, p. 215. Moreover, freedom of movement in El Salvador is restricted by the presence of the major gangs. *See* Exh. 3, Tab V, pp. 227-28. The 2019 DOS Report reveals, and Dr. Kirkland testified, that the gangs tightly control their respective territories and check the identification of individuals who enter their territories. *Id.* If gang members discern that an individual resided in a rival gang's territory, such individual risks being killed, beaten or denied entry into the territory. *Id.* Additionally, considering his tattoos that he cannot completely cover, the applicant would be unable to travel anywhere in El Salvador where gang members and the police would not believe he has a gang allegiance and target him as a result. As such, the applicant has demonstrated that he would be unable to relocate anywhere within El Salvador where he would be safe from torture.

After considering all the evidence of record and all the circumstances, the Court finds that the applicant has demonstrated that upon his return to El Salvador, he would more likely than not be tortured or killed at the instigation of, or with the acquiescence of a Salvadoran public official or one acting in an official capacity. *See Rodriguez-Arias*, 915 F.3d at 971-73. Therefore, the Court grants the applicant's application for deferral of removal under the CAT.

IV. CONCLUSION

For the foregoing reasons, the Court finds that the applicant has met his burden in demonstrating that he would more likely than not be tortured upon his removal to El Salvador. Therefore, for the foregoing reasons, the Court grants his application for deferral of removal under the CAT.

Accordingly, the Court enters the following orders:

ORDERS

It Is Ordered that:

the applicant shall be **REMOVED** from the United States to El Salvador pursuant to the Form I-851, Notice of Intent to Issue a Final Administrative Removal Order.

It Is Further Ordered that:

the applicant's application for withholding of removal pursuant to INA § 241(b)(3) is **DENIED**.

It Is Further Ordered that:

the applicant's application for deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16-.18 is **GRANTED**.

August 4, 2020
Date

Deepali Nadkarni
Deepali Nadkarni
Immigration Judge

CAT ADVISAL: The Court is granting you deferral of removal under the Convention Against Torture. This relief provides that your removal to El Salvador shall be deferred because you would more likely than not be tortured if you returned. This relief protects you only from removal to El Salvador and does not prevent your removal at any time to another country where you will not likely be tortured. This relief does not give you any lawful or permanent immigration status in the United States and will not necessarily result in your release from custody. Finally, the deferral of your removal is not necessarily permanent—it is subject to review and termination if it is determined that: (1) it is not likely that you would be tortured in El Salvador, or (2) you request that the deferral of your removal be terminated. *See* 8 C.F.R. § 1208.17(b).

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.