

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

IN THE MATTER OF

IN REMOVAL PROCEEDINGS

[REDACTED] Sandra [REDACTED]

Case #A97 [REDACTED]

RESPONDENT

CHARGE:

Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i), as amended, in that Respondent is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General

APPLICATIONS:

Asylum, pursuant to INA § 208, Withholding of Removal pursuant to INA § 241(b)(3), and Withholding of Removal pursuant to Article III of the Convention Against Torture

APPEARANCES

ON BEHALF OF RESPONDENT:

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ON BEHALF OF THE DHS:

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MEMORANDUM OF DECISION AND ORDER

I. Procedural History

Respondent is a 28-year-old female, native and citizen of Guatemala. On or about February 11, 2004, Respondent illegally entered the United States in or about Calexico, California. Respondent was taken into custody in February, 2004. She was served with a Notice to Appear (NTA) on February 11, 2004.

The NTA alleges that: (1) Respondent is not a citizen or national of the United States; (2) Respondent is a native of Guatemala and citizen of Guatemala ; (3) Respondent arrived in the United States at or near Calexico, California on or about February 7, 2004; and (4) Respondent was not then admitted or paroled after inspection by an Immigration Officer. See Court Exhibit 1. Based on these allegations, the NTA charges Respondent with removability pursuant to INA § 212(a)(6)(A)(i).

At an Individual Hearing on March 23, 2006, the NTA was orally amended to reflect the correct entry date of February 11, 2004. *Id.* Respondent then admitted all of the allegations contained in the NTA and conceded removability. Thus, the Court sustained the charge of removability under INA § 212(a)(6)(A)(i), and Guatemala was designated by the Court as the country of removal, at the request of the DHS. Respondent requested relief from removal in the forms of asylum under INA § 208, withholding of removal pursuant to INA § 241(b)(3), and withholding of removal pursuant to Article III of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”).

Respondent was released from DHS custody after payment of a \$6,000 bond. She filed a Motion for Change of Venue that was granted on July 13, 2004, changing venue from Las Vegas to Baltimore.

At an Individual Hearing on March 13, 2005, Respondent testified on her own behalf. At the close of the hearing, the Court’s reserved its decision to further review the testimony and evidence presented. Having had an opportunity to do so, the Court’s decision and order now follow.

II. Evidence Presented

A. Testimonial Evidence

Testimony of Respondent

Respondent testified that she was born in Guatemala on December 5, 1978. She has one daughter, born February 1, 2001. Respondent came to the United States because she was getting death threats from members of a gang. Her first encounter with gang members was in September, 2002. She was leaving work to go eat lunch at her brother's house, where she was living. Respondent worked at this time at a textile factory called Viatex SA, located in the San Francisco area of Guatemala City. Her brother's house was approximately six blocks from the factory. As Respondent was walking a young man appeared on his bike. Respondent said she had never seen him before. He asked her if he could go along with her but she said "no, thank you." According to Respondent he was wearing loose pants and a t-shirt, and his appearance told her he was from a gang "because of the way he was dressed." The man did not ask her anything else except her name. She told him her name was Ana because she did not want to give him her real name. After this, he kept walking with her even though she told him to please stop bothering her.

Respondent next had contact with this same individual three days later. She left work at approximately six p.m. and was walking when she felt a hand grab her buttock very hard. She "felt very bad, afraid" when this happened. She recognized the man to be the same man as a few days before. She stated that she told her brother about this incident. He wanted to go look for the man to complain but she "didn't want him to because something could have happened to him."

On another later date Respondent was walking and the same man appeared. He told her he wanted to be her boyfriend and wanted her to be his girlfriend. He did not touch her at this time. However, she saw him again when leaving work. She was worried because of what happened before. She testified that she suddenly felt someone grab her really hard, and he touched her right breast. He was on his bicycle. Respondent said that she was very scared because once again he was following her and she was alone. He only laughed and left. Again she told her brother.

Respondent testified that she noticed that this man was following her and watching where she was going every time she left work. He was generally with two other men. There was one specific time

where she was leaving work in the evening. The man and his two friends were there. One of them approached her and asked her what time it was. She stated that she was afraid when she noticed it was the same people. She did not answer the question so they started insulting her. One man said, "Hey, daughter of a bitch, I'm talking to you." She did not respond and kept walking. She was going to her brother's house. The men followed her for a bit and then left. Respondent testified that she felt terrified because they had "already chosen her." They kept following her and one man wanted her to be his girlfriend, which according to Respondent meant she would have to "do what he said." She testified that she was afraid he would kill her or rape her.

Respondent testified that she wanted to change jobs so that the men could not find her. The new job she wanted asked her for criminal and police records. She went to get them and when she was on her way back she had to wait for a bus. That day there were a lot of people out on the streets. She said that as she was standing there all of a sudden the same three men who were always following her appeared. She stated that this was in Zone One in Guatemala City, between 10 and 11 a.m. The one man who had been following her with the bike grabbed her very hard on the chin or lower part of her face. She said that he then got an orange and threw it at her. The three men grabbed her and one man pushed her into another. The three then pushed her between them as if she "were a ball," and they laughed. Respondent testified that their eyes were extremely red. She said that she heard one man call the individual who had been following her "El Enano." No one on the street helped her and no police appeared. This encounter lasted approximately ten minutes, and Respondent said the men left after they made fun of her. Before leaving they said "we're going to keep following you." She went to her brother's house but did not tell him about the incident because she was afraid he would go look for the men and they would hurt him.

Some time later, Respondent was going to her mother's house in Progreso, at approximately 10 or 11 a.m. She was at the bus station that was going to take her there, on 18th Street. She was going to use the public phone to call her brother to let him know she had arrived safely, when El Enano appeared. He took her phone card, and asked her whom she was calling. She did not answer because she was afraid. He grabbed her waist, took out a knife and put it to her neck. He said he was going to kill her. A street vendor said "leave her alone," but nothing else. El Enano told him not to get involved.

At that time a bus was coming. The bus driver saw what was happening. He stopped in front of them and said "hey, leave her alone." El Enano said, "don't get involved, this is not with you." The driver got off the bus. According to Respondent, he was a very big, strong man and when El Enano saw this he took off running. The driver asked if she was ok and she said she was terrified but thanked him for his help. Respondent continued on to her mother's house but stayed only one day because she had to return to her job, as she had been promoted to the position of quality control inspector. At this time her daughter was at her brother's house, and she was terrified to be without her.

Respondent had another incident with El Enano after returning from her mother's house. This time she was with her daughter. The encounter took place in Zone One, between 19th and 20th Streets. She was walking with her daughter when suddenly El Enano appeared with the same two men who were always with him. When she saw him she "couldn't believe it" because this time she was with her daughter. Respondent said El Enano took her by the waist and took out a knife. He held it to the right side of her waist. She said, "please don't do anything to me," but he said he was going to kill her. She did not say anything else. Her daughter was in her arms. The other two men were close by, behind and on either side of her. She testified that there was no way to flee. When they left she went to her brother's house. She told him about this incident. He wanted to go look for El Enano but because of her fear that they would hurt him she asked him not to go.

Respondent testified that on another day she was sent from the main factory where she worked to a smaller one about three blocks away. As she was walking El Enano and the other two men approached her. El Enano got behind her and grabbed her by the neck. He put a knife to her neck and said "today I'll kill you." At some point he had identified himself as a gang member and said "we are of the 18's." From there, Respondent went to her brother's house. She did not go to the factory. She told her brother about the incident and then decided to "accuse him" at the office of a public official. This was on April 11. The official was at Police Station 11 of Zone One. See Exhibit 5, subexhibit C. She told the official everything that had happened that day and everything that El Enano had been doing, including following her and saying he wanted to kill her. According to Respondent, after taking her statement the official took no action on her behalf. No one followed up on the complaint and no police officers went to her home to interview her.

Respondent testified that she did not remain at her brother's house because she was too afraid that El Enano would kill her. She moved to a new neighborhood called Tierra Nueva, where she rented a room. She did not go back to work at Viatex. Respondent said she had a sewing machine with her so she sewed and did repairs. She changed jobs because she was afraid El Enano would kill her. She testified that she went out very little. She lived in this neighborhood for nine months, and her daughter lived with her.

She testified that she did not go to live with her mother in Jicaro because El Enano would have followed her and would have killed not only her but also her family. Respondent left Guatemala alone. When asked why she did not move to El Salvador or Honduras she said it was because those countries also had a lot of gangs. She testified that if ordered to return to Guatemala it would be very difficult for her because she knows that he would kill her because he wants her to be his girlfriend. Respondent said she has heard about women who were hurt or killed because they resisted the sexual overtures of gang members. Respondent said she fears this if she goes back to Guatemala. Finally, she testified that she is a member of an evangelical church in Maryland.

On cross-examination, Respondent was asked why her affidavit does not say she heard of women hurt for rejecting gang members, and she answered that she forgot. She heard about such women in Guatemala because "they have killed many women." She was also asked to confirm the date when she moved to Tierra Nueva because her application says she moved there in June. Respondent testified that she moved there in April and was confused. She said that she did not have problems during the nine months she lived there because she never went out. She stayed "closed up" unless she had to go somewhere with her daughter, like the doctor's office. She testified that if she had gone home, since the men were following her they would have seen her and could have killed her or her family.

Respondent testified that her brother who used to live in San Francisco One has now moved to another zone of Guatemala City further away. He moved because after she came to the United States her brother noticed that the men were asking about her. He moved away to avoid that. When asked about moving back to Guatemala and living with her brother in the further zone, she said that her fear is that they would kill her and she has a daughter and wants to live with her. However, her family

members have not had problems since she left.

Finally, Respondent testified that she forgot to give the title of the public official she went to see in her testimony— her statement says he was a prosecutor. See Exhibit 5, subexhibit C. She stated that the highest level of education she has achieved was sixth grade in elementary school.

Testimony of Dr. Joseph Gorin¹

Dr. Gorin was qualified as an expert and submitted a psychiatric evaluation of Respondent. See Exhibit 7. He testified that he saw Respondent on three dates, which he recalled after being shown his report as February 27, 28 and March 1 of 2006. Respondent came to this witness for evaluation regarding the immigration process. Dr. Gorin was aware of the purposes of the evaluation. He testified that he took a statement from Respondent, which revealed a series of painful events that had happened to her regarding physical and sexual harassment in Guatemala City. The witness evaluated Respondent in Spanish, as he is fully bilingual. He used some self-administered procedures (the Trauma Symptom Inventory, the Beck Depression Inventory, and the Anxiety Inventory) as well as a clinical interview and the Clinician-Administered Post-Traumatic Stress Disorder Scale (CAPS).

The witness was asked whether there was any way to control for false statements in self-administered tests. He answered that some tests have “validity scales,” and there are generally three kinds— false “good” (when someone would want to look better than they really are, such as when they’re being evaluated for probation), false “bad (which is a concern, according to Dr. Gorin, in this sort of case), and whether the test-taker understood the test and the instructions. An individual’s results can be invalid based on any combination of those validity scales. The witness was then asked whether there are any validity scales in clinical exams. He stated that the Trauma Symptom Inventory has a validity scale but the others do not. In order to make sure the answers are truthful Dr. Gorin said he looks at the validity scales and “if they’re good that’s encouraging,” though not fool-proof.

In Respondent’s particular case, there was in Dr. Gorin’s opinion “no evidence at all of exaggeration or malingering.” He testified that “it actually appeared that she was slightly understating her

¹Dr. Gorin testified prior to Respondent during the Individual Hearing.

symptoms based on the validity scale measures." However, it was not very significant but rather a "slight tendency." Dr. Gorin said Respondent might be someone who tends to deny her problems, probably to herself. The witness said can be other signs of invalidity as well. People who are exaggerating tend to endorse a lot of symptoms. Respondent did not endorse enough symptoms to be diagnosed with Post-Traumatic Stress Disorder (PTSD) currently-- meaning "check off" the symptom on the test and indicate its severity. He stated that she also did not have any scales on the Trauma Symptom Inventory that were elevated. According to Dr. Gorin, someone who was exaggerating would endorse a number of symptoms. On the other tests there were symptoms Respondent did not even endorse.

Dr. Gorin testified that Respondent has a number of post-traumatic symptoms, though not enough to be diagnosed with PTSD. According to the witness, to be diagnosed with PTSD there are three areas of symptoms and the individual must have so many symptoms in each of the three areas. Respondent did not have enough in any of the three. Over the course of her life, "if you go back to when she was still in Guatemala she did have enough in each category." The witness said Respondent still suffers from post-trauma symptoms, and has some minor depression and severe anxiety. The anxiety manifests in particular symptoms, including nervousness and difficulty sleeping. The trauma symptoms come from the traumatic incidents which occurred in Respondent's life.² Her post-traumatic symptoms are tied with those events. Anxiety is one of the symptoms of trauma, according to Dr. Gorin, but "there's also probably a lot of anxiety from her uncertain immigration status, depression from being separated from her country and her daughter" and from the life she knew, so "some of it isn't directly attributable to the traumatic experience, it's more corollary, whereas the post-traumatic symptoms and some of the anxieties are directly attributable to the traumatic experiences Respondent has had."

Dr. Gorin testified that if Respondent were to return to Guatemala there is a strong possibility that her post-traumatic symptoms would reappear in full force, or even in a higher degree. PTSD is

²The witness testified that a traumatic incident is defined in the diagnostic manual as not simply a bad experience but there must be some actual threat of violence in the moment to qualify.

“particularly vulnerable to exacerbation if somebody’s confronted with reminders of the trauma.” These do not have to be direct reminders— if she were to go back and see a man looking at her in a particular way that could be a trigger. The witness said that this could happen here too but that it’s “much more likely to happen in Guatemala where more people look like the man who harassed her. Dr. Gorin said that Respondent would be more likely to be hyper-vigilant, which is one of the post-trauma symptoms, and that those types of symptoms would be much more likely to manifest in Guatemala, although they manifest here also. These symptoms are, according to the witness, very consistent with someone who experienced the type of trauma Respondent related in her history. She had a number of “very threatening and at times physical altercations where she was exposed to or reports being subject of threats.” Dr. Gorin stated that he could be sure with a high degree of professional certainty that Respondent had post-traumatic symptoms, that she had had PTSD, and that she had been exposed to traumatic experiences as defined by the statistical manual. He also stated that he had no particular expertise in saying whether her story is true or not, but said with a “high degree of confidence” that Respondent has had some traumatic things happen to her.

On cross-examination, Dr. Gorin was asked how he could state what Respondent “had psychologically” in Guatemala if he never interviewed or assessed her there. He answered that based on a structured questionnaire about those times, and given that Respondent’s self-report is understated, “there don’t appear to be any indicators that she tried to deliberately or unconsciously” mislead when answering questions. According to the witness, CAPS assesses that. He testified that research has demonstrated that “if you have a valid report, you’re getting a pretty good picture of what they experienced at the time you’re interviewing them about.”

The witness was then asked what symptoms Respondent reported having in Guatemala that she did not report having had in the United States that lead him to believe that she had PTSD in Guatemala. Dr. Gorin responded that she had 8 symptoms spread over the three PTSD categories (PTSD can be diagnosed with six), with some in each category. Now Respondent has fewer. He could not precisely state when she had PTSD, but stated that it was probably in the period when she quit her job and moved into the apartment alone. His impression from discussion with her is that “she didn’t experience improvement in psychological condition until after she arrived in the United States.” The witness

reiterated, when asked, that Respondent could be exposed to triggers here, and it could be any man who looks at her that triggers a response, but asserted again that because the trauma happened in Guatemala she would be hyper-vigilant, always on the lookout for the man who harassed her, and she would be more likely to be exposed to reminders of the trauma. The witness was asked what would happen if Respondent moved to another part of Guatemala. He stated that she would probably still be hyper-vigilant though might relax a bit.

Finally, Dr. Gorin was asked whether Respondent experienced depression due to the trauma or due to separation. He testified that depression is secondary, not a sign of PTSD, but many people with PTSD get depressed because of disruptions in their lives. However, these disruptions in life are a result of the traumatic experiences.

B. Documentary Evidence

The following exhibits were received and admitted into evidence:

Court Exhibit 1:

- Notice to Appear, dated February 11, 2004

Court Exhibit 2:

- Respondent's Motion for Change of Venue, dated April 2, 2004

Exhibit 3:

- Form I-589, Application for Asylum and for Withholding of Removal

Exhibit 4:

- A. *Femicide in Guatemala*, Risa Grais-Targow
- B. Amnesty International Press Release, *Guatemala: Killings of women continue unchallenged*, dated November 24, 2005
- C. Amnesty International, *Fear for Safety*, Staff and volunteers of the Asociacion de Mujeres Ixqik (Ixqik Women's Association), Guatemala
- D. Amnesty International, *Guatemala: No protection, no justice: killings of women and girls— Facts and Figures*, dated June 9, 2005
- E. Amnesty International, *No Protection, No Justice: Killings of Women in Guatemala*
- F. Amnesty International Report, covering events dated January-December 2004
- G. Guatemala Human Rights Commission/USA, *Guatemala Human Rights Update*, dated February 15, 2001

- H. U.S. Department of State 2004 Country Report on the Human Rights Practices in Guatemala
- I. Manuel Bermudez, *Violence Against Women Unchecked and Unpunished*, Inter-Press Service News Agency, dated December 2, 2005
- J. Guatemala Human Rights Commission/USA, *Guatemala Human Rights Update*, dated March 1, 2005
- K. Findlaw.com, *Salvadoran authorities capture gang members accused of mutilating women*, dated December 2, 2005
- L. Julio Lara, *Violence: Two in Villa Nueva, one in Peten and another one in San Marcos*, translated from the original Spanish on December 1, 2005

Exhibit 5:

- A. Respondent's Passport, issued by the Republic of Guatemala
- B. Respondent's Birth Certificate with English language translation
- C. Respondent's Declaration to Public Official with English language translation,

Exhibit 6:

- A. Statement of Michael J. Garcia, Assistant Secretary of ICE before the House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims
- B. Strategic Insights, *The Maras and National Security in Central America*, May 2005
- C. World Vision, *Youth Violence: The 'Maras'*, 2005
- D. Associated Press, *2 MS-13 gang members guilty of murder*, May 17, 2005
- E. Newsweek, *The Most Dangerous Gang in America*, March 28, 2005
- F. Investigator Al Valdez (Orange County District Attorney's Office), *A South American Import*, April 12, 2005
- G. Journal of the Religious Task Force on Central America and Mexico, *Region's governments sign anti-gang pact*, May/June 2004
- H. Power and Interest News Report, *Central America's Street Gangs Are Drawn into the World of Geopolitics*, August 26, 2005
- I. AFP, *US to Deport Hundreds of Gangsters to Latin America*, 2005
- J. Resource Center of the Americas, *Grim News in Central America: Wave of Gang Violence Grows*, January 29, 2004
- K. www.cnn.com, *Guatemalan Prison Riots kill dozens*, August 16, 2005
- L. Inter Press Service, *Spread of Central American Youth Gangs Uncurbed*, 2005
- M. The Texas Observer, *Mexicanizing the Mara*, June 18, 2004
- N. ICE Fact Sheet on Operation Community Shield, October 11, 2005
- O. ICE News Release on ICE's National Crackdown on Central American Gangs, April 14, 2005
- P. ICE News Release on ICE's National Crackdown on Central American Gangs, November 3, 2005

- Q. Inside ICE, *ICE Arrests 95 Gang Members*, May 23, 2005
- R. ICE News Release on ICE's Arrest of 582 Gang Members, August 1, 2005
- S. ICE News Release on ICE's Arrest of 103 Gang Members, March 14, 2005
- T. ICE News Release on ICE's Arrest of 47 Gang Members, November 25, 2005

Exhibit 7:

- A. Affidavit of Responent
- B. Psychological Evaluation of Joseph Gorin, Psy.D., dated March 7, 2006

Exhibit 8:

- Respondent's Pre-Hearing Memorandum in Support of Respondent's Application for Asylum and Withholding of Removal
- Respondent's Witness List

III. Statement of Law and Findings of the Court

The Court has considered the entire record carefully. All evidence and testimony has been considered, even if not specifically addressed further in the decision below. Respondent's applications for asylum under INA § 208 is **GRANTED** based on the following findings. Subsequently the Court need not consider her applications for withholding of removal under INA § 241(b)(3) and Article III of the Convention Against Torture.

A. Asylum

1. Applicable standards

To qualify for a grant of asylum, an alien must credibly demonstrate that he or she is a "refugee" within the meaning of INA § 101(a)(42)(A). INA § 208(b)(1); see also 8 C.F.R. § 1208.13(a). As such, the alien must demonstrate that he or she is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, his or her country of nationality because of persecution or a well-founded fear of persecution "on account of [his or her] race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A). Additionally, the alien's fear of persecution must be country-wide. *Matter of C-A-L-*, 21 I&N Dec. 754 (BIA 1997); *Matter of R-*, 20 I&N Dec. 621 (BIA 1992); *Matter of Acosta*, 19 I&N Dec. at 235; see also

Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988). “In short, to qualify for asylum, one must show: (1) a well-founded fear of persecution; (2) on account of one of the above described enumerated statutory grounds; (3) by an organization that the government is unable or unwilling to control.” See **Lopez-Soto v. Ashcroft, 383 F.3d 228, 234 (4th Cir. 2004).** Finally, the alien must demonstrate that he or she is eligible for asylum as a matter of discretion. **INA § 208(b)(1); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987).** An alien requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under **INA § 208.** See **8 C.F.R. § 1208.13(a); see also Matter of S-M-J-, 21 I&N Dec 722 (BIA 1997); Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987).**

As a preliminary matter, under **INA § 208(a)(2)(B)**, an applicant for asylum must demonstrate by clear and convincing evidence that the application has been filed within one year after the date of the alien’s arrival in the United States. Respondent entered the United States on February 11, 2004. Her application for asylum was filed on February 7, 2005. Respondent has adequately met the one-year filing deadline.

2. Credibility

In applications for asylum, withholding of removal, and withholding of removal under **Article 3 of the Convention Against Torture**, the Court generally must make a threshold determination of the alien’s credibility. **Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998); see also Matter of Pula, 19 I&N Dec. 467 (BIA 1987); Matter of Vigil, 19 I&N Dec. 572 (BIA 1988).** An applicant’s own testimony is sufficient to meet his or her burden of proving his or her asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his or her fear. **Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); see also 8 C.F.R. § 1208.13(a).** An applicant may be given the “benefit of the doubt” if there is some ambiguity regarding an aspect of his or her asylum claim where credibility is not specifically called into question. See **Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998).** In assessing the application for asylum, inconsistent accounts create doubts regarding the alien’s credibility. See **Matter of Mogharrabi, 19 I&N Dec. at 446.** To be

sure, in some cases, an applicant may be found to be credible even if he or she has trouble remembering specific facts. See e.g., **Matter of B-**, 21 I&N Dec. 66 (BIA 1995) (finding that an alien who has fled persecution may have trouble remembering exact dates when testifying, and such failure to provide precise dates may not be an indication of deception). However, testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable or implausible. **Matter of S-M-J-**, 21 I&N Dec. at 730; see also **Matter of A-S-**, 21 I&N Dec. 1106 (BIA 1998). While omissions of facts in an asylum application or during testimony alone might not, in themselves, support an adverse credibility determination, the omission of key events coupled with numerous inconsistencies may provide a specific and cogent reason to support an adverse credibility finding. **Matter of A-S-**, 21 I&N Dec. 1106 (BIA 1998).

The REAL ID Act of 2005³ amended various sections of the Immigration and Nationality Act relating to the adjudication of asylum applications. **Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005)**. For asylum applications filed on or after May 11, 2005— as was Respondent's--the following factors may be considered in the assessment of an applicant's credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, whether or not such inaccuracy or falsehood goes to the heart of the applicant's claim. **INA § 208(b)(1)(B)(iii)**.

In assessing the credibility of Respondent's testimony in the instant case, the Court has taken into account not only whether the testimony was plausible and detailed, but also its internal consistency. **Matter of B-**, 21 I&N Dec. 66 (BIA 1995). The Court finds Respondent generally credible. Respondent's testimony was consistent with her I-589 application and her personal affidavit, and the few minor inconsistencies that were evident were insufficient to discredit Respondent's testimony as a whole. Her testimony was also sufficiently detailed to provide a clear account of the basis for Respondent's fear. Respondent submitted ample documentary evidence depicting the gang culture in

³ The REAL ID Act was enacted on May 11, 2005. The changes it made to immigration law apply to asylum applications filed on or after that date.

Central America and its attendant activities. Much of this evidence corroborates Respondent's personal experiences with MS-18 and other gangs in Guatemala. Finally, the expert testimony demonstrated that Respondent's psychological state was consistent with someone who had undergone the sort of traumatic experience she described. Therefore, after a thorough review of the evidentiary record, the Court determines credibility in Respondent's favor.

3. Persecution

An asylum applicant must also prove that there is a reasonable possibility that she might suffer persecution if returned to her native country. See 8 C.F.R. § 1208.13(b)(2)(i)(B). An applicant for asylum demonstrates a well-founded fear if he or she presents specific facts establishing that he or she has actually been the victim of persecution. Cardoza-Fonseca, 480 U.S. at 421; Matter of Mogharrabi, 19 I&N Dec. at 439. Evidence of past persecution raises a rebuttable presumption that an alien has reason to fear future persecution. Matter of Chen, 20 I&N Dec. 16 (BIA 1989); 8 C.F.R. § 1208.13(b)(1)(i). This presumption may be rebutted by proving by a preponderance of the evidence that conditions in the country have changed to such a degree that there is little likelihood of present persecution. Matter of Chen, 20 I&N Dec. at 18; see also Ngarurih v. Ashcroft, 371 F.3d 182 (4th Cir. 2004). However, failure to establish past persecution does not preclude an alien from establishing a well-founded fear of future persecution; rather, it merely means he or she is not entitled to the same presumption.

A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. See Cardoza-Fonseca, 480 U.S. at 421. The standard for proving a "well-founded fear of persecution" is the "reasonable person test," Huaman-Cornelio v. BIA, 979 F.2d 995, 999 (4th Cir. 1992) (citing M.A. v. INS, 899 F.2d 304, 311 (4th Cir. 1990)(en banc)), which includes subjective and objective elements. Cardoza-Fonseca, 480 U.S. at 430-31. To demonstrate a subjective fear of persecution, an applicant must demonstrate that his or her "fear has some basis in the reality of the circumstances and is validated with specific, concrete facts," Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 284 (4th Cir. 2004) (citing Huaman-Cornelio v. BIA, 979 F.2d at 999), and is not "mere irrational apprehension." M.A. v. INS, 899 F.2d 304, 311 (4th Cir. 1990)). The

objective component requires that “a reasonable person in similar circumstances would fear persecution on account of” one or more of the protected grounds. **Blanco de Belbruno v. Ashcroft**, 362 F.3d 272, 284 (4th Cir. 2004) (citing **Cruz-Diaz v. INS**, 86 F.3d 330, 331 (4th Cir. 1996)); see also 8 C.F.R. §1208.13(b)(1)-(2). A respondent therefore must show some degree of likelihood that she may be persecuted. **Matter of Acosta**, 19 I&N at 226; see also **Cardoza-Fonseca**, 480 U.S. at 431.

The Board of Immigration Appeals (“BIA” or “the Board”) has interpreted “persecution” to include serious threats to an individual’s life or freedom, or the infliction of significant harm on the applicant, as a means of punishing that person for holding a characteristic that the persecutor seeks to overcome. **Matter of Acosta**, 19 I&N at 233. Cf. **Klawitter v. INS**, 970 F.2d 149, 152 (6th Cir. 1992) (distinguishing between mere harassment and persecution); **Fatin v. INS**, 12 F.3d 1233, 1240 (3^d Cir. 1993) (finding that persecution within the INA does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional); **Matter of Kasinga**, 21 I&N Dec. 357, 365 (BIA 1996) (discussing the level of harm necessary to constitute persecution). Persecution must also be more than mere harassment.

i. Analysis

In the case *sub judice*, the Court finds that Respondent has established that she has a well-founded fear of future persecution based on the past persecution she suffered in Guatemala. Respondent credibly testified regarding various instances of harassment she suffered at the hands of MS-18 gang members. Respondent was followed almost constantly by the same three gang members, and they were able to find her at locations throughout Guatemala City. One, known as El Enano, singled her out to be his girlfriend and appeared many times as Respondent was leaving work. On numerous occasions he assaulted her physically and sexually. He also held a knife to her body several times and threatened to kill her. Once he did this while Respondent was holding her young daughter in her arms. Respondent was forced to leave her brother’s home and hide in an apartment for approximately nine months, during which time she was unable to go out on the street for fear of being found by the gang members.

Importantly, Respondent offered both an affidavit and oral testimony from Joseph Gorin, Psy.D. a Psychologist licensed in Maryland and Washington D.C. Dr. Gorin saw Respondent on three occasions for evaluation. Dr. Gorin testified that Respondent had probably suffered from Post-Traumatic Stress Disorder while still living in Guatemala. Additionally, he found that she still retained some post-traumatic symptoms and also suffered from anxiety. Dr. Gorin found that Respondent's re-telling of the events in Guatemala was consistent among her visits, and that she was probably slightly understating her symptoms. Finally, he testified that the symptoms Respondent was experiencing were consistent with the events that she had described to him. Dr. Gorin's testimony is strong evidence that Respondent suffered traumatic events in Guatemala. Certainly, being relentlessly stalked, threatened, and physically and sexually assaulted by members of a violent gang whom the Guatemalan government has heretofore been unable to control would qualify as "infliction of suffering" and thus be considered past persecution. See Kasinga.

The Court also finds that Respondent's testimony, when considered in conjunction with the evidence in the record, is sufficient to find that Respondent's fear of future persecution is both subjectively genuine and objectively reasonable. This is supported by the documentary evidence regarding gang activity in Central America submitted by Respondent. No evidence of changed country conditions was presented to rebut the likelihood of future persecution.

4. Persecution on Account of one of the Five Enumerated Grounds

In addition to showing persecution or a well-founded fear of persecution, an applicant for asylum must demonstrate that he or she is unable or unwilling to return to or avail himself or herself of the protection of his or her country because of persecution or a well-founded fear of persecution "on account of" race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.13(b)(2)(i)(A). Even treatment that is regarded as "morally reprehensible" is not "persecution" within the meaning of the Act unless it occurs "on account of" one of the five enumerated grounds. *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997).

Membership in a particular social group is one of the five enumerated grounds upon which an applicant may base his or her claim for asylum. 8 C.F.R. § 1208.13(b). The Supreme Court and BIA

interpret the phrase “membership in a particular social group” to mean a member of a group of persons who all share a common, immutable characteristic. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). The “common characteristic that defines the group ... must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act ...” *Matter of Acosta*, 19 I&N Dec. at 233. The common characteristic may be as innate as sex, color, or kinship ties, or as subtle as a shared past experience and it will be determined on a case-by-case basis. *Id.* “However, the mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group.” *Matter of R-A-*, 22 I&N Dec. 906, at 919 (BIA 1999).

A nexus must exist between the shared trait of the social group and the persecution suffered such that the persecutors are motivated, at least in part, by the immutable characteristic and view the members of the social group as warranting suppression or infliction of harm. *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 236 (4th Cir. 2004); *Matter of R-A-*, 22 I&N Dec. at 918, 920-921 (BIA 1999); *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) (citing *Chang v. INS*, 119 F.3d 1055, 1065 (3d Cir. 1997)). Motive is critical and the applicant “must provide *some* evidence of it, direct or circumstantial.” *INS v. Elias-Zacarias*, 502 U.S. 578, 483 (1992). Where an applicant has not shown past persecution, he or she must prove motivation for future persecution by a preponderance of the evidence. See *Lopez-Soto* at 234 ; *Zhu v. Ashcroft*, 382 F.3d 521, 528 n.6 (5th Cir. 2004).

i. Analysis

In the present case, Respondent asserts that she “is a member of the particular social group of young women who refuse to be the victims of violent sexual predation of gang members.” This social group can be categorized as “limited” or “discrete” as it does not include all young women in Guatemala or Central America but rather only those who have been targeted by gang members for

sexual exploitation, as was Respondent, and who refuse to submit to the advances of these men.

Moreover, the social group of young women who refuse to be the victims of sexual predation of gang members shares two common, immutable characteristics. The first characteristic is their sex. In Acosta the Board of Immigration Appeals said specifically that “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties... The particular kind of group characteristic that will qualify remains to be determined on a case-by-case basis.” [emphasis added]. Acosta at 233. Clearly one’s sex is not something often subject to change and, according to the BIA, could be sufficient to form the basis of a social group.

The social group asserted here by Respondent shares one additional immutable characteristic—the refusal to be sexually victimized by gang members. This idea finds support in Fatin v. INS, 12 F.3d 1233, 1241 (3rd Cir. 1993). The social group in that case was defined as “those Iranian women who find those laws [gender-specific religious laws] so abhorrent that they ‘refuse to conform’” despite enormous penalties for non-compliance. The Court found that “[l]imited in this way, the ‘particular social group’ identified by the petitioner may well satisfy the BIA’s definition of that concept, for if a woman’s opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as ‘so fundamental to [her] identity or conscience that [they] ought not be required to be changed.’” *Id.*⁴ In the case *sub judice*, Respondent’s opposition to being raped or otherwise sexually subjugated could certainly be characterized as so fundamental to her conscience that it ought not be required to be changed. Likewise, similar to the consequences of not complying with certain Islamic edicts, the penalty for Respondent for not complying with the demands of gang members would be severe—most likely rape or even death. Respondent and others in this particular social group should not be forced to decide between becoming victims of gang members’ sexual demands and the consequences for not complying.

Respondent also must show that she was persecuted *on account of* her membership in a particular social group. She was originally targeted by gang members, specifically by El Enano, because she is female—an immutable characteristic. However, the initial harassment turned into threatening and

⁴The Court went on to hold for other reasons that the alien in that case did not herself qualify for the social group so defined.

dangerous pursuit precisely because Respondent refused their advances. They continued to stalk her and intimidate her, assaulting her physically and sexually, because she did not give in to their demands. Respondent remained a target for abuse by gang members specifically because she was a woman who refused to be a victim of violent sexual predation by gang members despite potentially life-threatening consequences.

5. Government "Unable or Unwilling" to Control

An alien applying for asylum finally must establish that the fear of persecution is country-wide and, in cases where the government itself is not responsible for said persecution, that it has occurred or may occur at the hands of an organization that the government is unable or unwilling to control. See **Lopez-Soto at 234** (citing **M.A. A26851062, 858 F.2d at 218**) (stating "asylum is warranted if petitioner can show the "government is unwilling or unable to control the offending group"). The organization does not have to be affiliated with the government in any way. See, for example, Kasinga (persecution by members of a particular clan); **Matter of S-A-**, **22 I&N 1328 (BIA 2000)** (Respondent was persecuted by her ultra-religious father for her moderate beliefs); **Matter of O-Z- & I-Z-**, **22 I&N 23 (BIA 1998)** (persecution by anti-Semitic nationalists).

i. Analysis

First, Respondent has credibly shown that her fear of persecution is country-wide. She testified that El Enano and his fellow gang members were able to locate her throughout Guatemala City, appearing at her home, her work, and near the homes of her family members. She also testified that the only reason that she had no problems with these men when she moved to a new apartment is because she virtually never went outside. Additionally, Respondent provided ample documentary evidence that the gangs are so widespread in Guatemala and in Central America that this Court believes that the gang members would be able to find her were she to relocate to another part of Guatemala. See **Exhibits 4 and 6**. Again, no evidence was presented to show that conditions in Guatemala have changed since Respondent left the country.

Respondent has also established that the government of Guatemala is unable to control the

gangs there, even if there is a willingness to do so. Again, Respondent provided ample documentary evidence that speaks to this point-- the region has largely been overwhelmed by gang violence. *Id.* The gangs in Guatemala have been particularly brutal in their treatment of women and the Guatemalan government has not been able to address this problem. See **Exhibit 4, Subexhibits D and E.** Respondent also submitted a statement that she made to a public official while still in Guatemala complaining of the constant harassment she was suffering. See **Exhibit 5, Subexhibit C.** However, Respondent testified that after she made this formal complaint no action was taken-- no one followed up on the complaint, no police came to interview her about the incident. Instead, the threats and intimidation continued. This demonstrates a pattern of abuse by gang members, who are able to operate with virtual impunity. The government of Guatemala is simply unable to control the activities of the gangs that operate virtually with impunity within its borders.

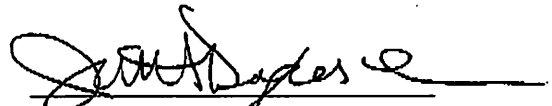
6. Discretion

Finally, the Court also finds that Respondent merits a grant of asylum as a matter of discretion. In the absence of any adverse factors, asylum should generally be granted as a matter of discretion, and "the danger of persecution should generally outweigh all but the most egregious of adverse factors." See **Matter of Pula, 19 I&N Dec. 467, 474 (BIA 1987)**. In the case at bar, the Government has not offered, and the Court has found, no adverse factors. Therefore, the Court also determines that Respondent merits a grant of asylum as a matter of discretion.

IV. Conclusion

The Court has found that Respondent has met her burden of proof with regard to her application for asylum and that she merits such relief as a matter of discretion. Accordingly, her application for asylum pursuant to INA § 208 will be granted. Moreover, as Respondent's application for asylum is granted, the Court need not consider her applications for withholding of removal under INA § 241(b)(3) and Article III of the Convention Against Torture. An appropriate order is attached.

11/8/06
Date



Jill H. Dufresne
United States Immigration Judge
Baltimore, Maryland

ORDER

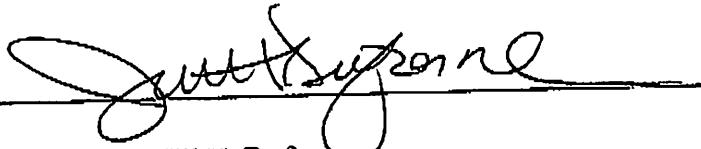
It is this 8th day of November 2006, by the United States Immigration Court, sitting at Baltimore, Maryland,

ORDERED:

- I. that the application for asylum pursuant to INA § 208 is **GRANTED**.

11/8/06

Date



Jill H. Dufresne
United States Immigration Judge
Baltimore, Maryland