

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HARTFORD, CONNECTICUT

IN THE MATTER OF:

██████████, ██████████
AKA ██████████
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IN REMOVAL PROCEEDINGS

RESPONDENT

CHARGES:

INA § 212(a)(7)(A)(i)(I), as amended: an alien who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, or who is not in possession of a valid unexpired passport or other suitable document, or identity and nationality document if such document is required by regulations issued by the Attorney General pursuant to INA § 211(a).

APPLICATIONS:

Asylum
Withholding of Removal
United Nations Convention Against Torture

ON BEHALF OF RESPONDENT

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ON BEHALF OF DHS

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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

██████████ (Respondent) is a native and citizen of Guatemala who arrived in the United States approximately 14 miles west of the Sasabe, Arizona port of entry on or about July 9, 2013. The Department of Homeland Security (DHS) served Respondent with a Notice to Appear (NTA) on August 5, 2013, charging Respondent as an arriving alien removable pursuant to INA § 212(a)(7)(A)(i)(I). Exh. 1. DHS alleged Respondent did not then possess or present a valid immigrant visa, reentry permit, border crossing card, or other valid entry document, and was neither admitted nor paroled into the United States after inspection by an immigration officer. *Id.*

On August 19, 2013, Respondent appeared for a master calendar hearing at the Eloy, Arizona Immigration Court. He thereafter moved the Eloy Court to change venue to the Hartford Immigration Court. The Eloy Court granted Respondent's motion on September 3, 2013.

On December 12, 2013, Respondent, by and through counsel, submitted written pleadings in which he conceded proper service of NTA, admitted all factual allegations and conceded the charge of removability. Exh. 2. On the basis of Respondent's admissions, the Court finds DHS has established Respondent's removability by clear and convincing evidence. Respondent declined to designate a country to which his removal should be directed if so ordered. The Court designates Guatemala as the country of removal in this case. Respondent indicated his desire to file an I-589 application for asylum, withholding of removal, and protection under the United Nations Convention Against Torture, and requested additional time to prepare a statement in support of his application. The statement was submitted to the Court on April 16, 2014.

Respondent personally appeared, testified, and submitted additional documents in support of his claims for relief at an April 16, 2014 merits hearing. DHS cross examined Respondent on May 6, 2014. On May 6 and May 28, 2014, the Court heard testimony from country conditions expert Thomas J. Boerman, PhD, and medical expert Doctor Katherine McKenzie.

II. TESTIMONIAL EVIDENCE

A. Respondent

Respondent was born in [REDACTED], San Marcos, Guatemala. Respondent married his current wife on [REDACTED], 2010, in Guatemala. He and his wife have a son, [REDACTED] and a daughter, [REDACTED]. [REDACTED] was three years old at Respondent's last hearing; [REDACTED] was one. Respondent and his family last resided together in [REDACTED], where Respondent owned and operated an [REDACTED] shop on property rented from a family friend. Respondent left Guatemala in early June 2013; he traveled alone by bus through Guatemala and Mexico and arrived in the United States in early July 2013. Out of fear for their safety, Respondent's wife and children left Guatemala in January or February 2013. They are currently in Mexico, close to the Guatemalan border, in the home of Respondent's wife's cousin. Respondent's wife returned to Guatemala on March 30, 2014 for approximately four hours to meet with and assist an attorney in preparing a declaration in support of Respondent's asylum case; she immediately returned to Mexico. Respondent's wife does not have a Mexican visa.

Respondent operated a [REDACTED] shop located in an open area in [REDACTED]. He acknowledged he directly competed for business with neighboring [REDACTED] shops on either side of his shop. He stated that "C [REDACTED]" owned one neighboring shop, and "L [REDACTED]" owned the other. Respondent believes C [REDACTED] and L [REDACTED] are associates or members of the Mara-18 because both bear tattoos of the number 18 on their necks and arms.

Respondent's troubles began shortly after he opened his mechanic shop, when two individuals he identified as C [REDACTED] and L [REDACTED] visited his shop and demanded he close the business or pay them money. Respondent's business was doing well, and not wanting to close his

shop, he complied with the men's relatively modest extortion requests. Respondent concurrently reported the extortion to the local police, who filled out some paperwork and put it into a desk drawer. Respondent is convinced the police did not take any further action in response to his complaint. Nonetheless, he believes C [REDACTED] and I [REDACTED] soon learned he had filed a police report.

When asked about the logistics of the extortion payments, Respondent testified a phone was left at his shop with a note indicating he should call a seemingly private number. Respondent was told to go to a specific place and to leave the money there. He did not meet anyone when he left his payments and did not ever see anyone collect the money.

C [REDACTED] and I [REDACTED] continued to demand money from Respondent, and Respondent made weekly payments for approximately 18 months. The initial weekly demands of roughly 700 Guatemalan Quetzales soon increased to approximately 2500 Quetzales. At first, Respondent was able to afford the extortion; however, as the demands increased, Respondent found it difficult to maintain his shop and care for his family while also complying with the weekly extortion demands. Respondent paid the men out of fear for his safety. He feared the men and the Mara-18 because gang members murdered a cousin who had refused to comply with similar extortion requests. Respondent's cousin's body was marked with the number eighteen and was found without fingers or testicles. Eventually it became impossible for Respondent to comply with the extortion demands and he ceased payment.

On January 27, 2013, after Respondent ceased compliance with the extortion demands, he responded to an evening call from a frequent client whose car had broken down in the road. After repairing the vehicle, Respondent returned to his home and then drove to the [REDACTED] restaurant to purchase food for himself and his family. As soon as Respondent left his home, he realized someone in another car was following him. Respondent drove quickly to [REDACTED], parked his car, and hurried inside. Respondent encountered a group of five friends inside the restaurant, and after informing his friends that he was being followed, the group agreed to accompany Respondent home in his car. Respondent ordered food and then he and his five friends left the restaurant in Respondent's car. The same car continued to follow Respondent.

Before Respondent was able to reach his home, a bus pulled in front of him, effectively preventing him from driving forward. The car following Respondent prevented him from backing away from the bus. After the three vehicles stopped, several men exited the bus, including a man Respondent recognized as C [REDACTED]. The men from the bus attacked Respondent's car, breaking the windows with heavy stone-like objects used as tire blocks. As more men exited the bus, Respondent and his friends abandoned Respondent's car and attempted to escape on foot. Respondent did not call the police because he believed they were not in the area that night. Had police been available, Respondent would have requested their assistance.

Respondent ran to a gas station hoping someone there could aid him. The station was closed, and C [REDACTED] and I [REDACTED] soon arrived. C [REDACTED] restrained Respondent's arms and legs while I [REDACTED] grabbed Respondent's hair, pulled his head backward, and struck his face with a machete. Respondent kicked the men and was able to escape. He ran to a nearby park and hid among a group of homeless men. Eventually Respondent left the park, walked to his mother's house, and

knocked at the door until his mother answered. The last thing Respondent remembers that night is his wife crying at the sight of him.

Respondent testified he was taken to a clinic in [REDACTED] at which he received stitches to repair a superficial wound on his face caused by the machete. He does not remember the clinic. Respondent was then transported to a larger facility in [REDACTED] where x-rays were taken; he remembers this experience. Finally, Respondent was moved to a hospital in [REDACTED], at which he underwent surgery and recuperated for four weeks.

While at the hospital, Respondent informed police that C [REDACTED] and L [REDACTED] attacked him with a machete; he also informed police about the extortion. Respondent reported the attack to police because he believed the police would help him. Respondent does not think the police took any action, because neither C [REDACTED] nor L [REDACTED] were arrested. Respondent's presence was requested in court in relation to the incident, but he failed to appear. Respondent denied he was subject to arrest for his refusal to appear. He testified he was afraid and that going to court was equivalent to offering himself to C [REDACTED] and L [REDACTED] to be killed. Respondent also stated he had left Guatemala when the letter requesting his appearance was received at his mother's home.

Respondent stayed in various locations after leaving the hospital, including the home of an uncle in [REDACTED], the homes of his parents and his wife's parents in [REDACTED], and a rented home in [REDACTED]. Respondent testified that handwritten threats directed to him were folded and slid under a door at each of these locations. The notes contained threats to Respondent's life rather than extortion demands. Because of the threats, Respondent was afraid to leave his home and he was unable to work. Respondent's family continued to receive written threats after Respondent left Guatemala. His in-laws received notes directed at Respondent, four of which Respondent submitted as evidence in these proceedings. Respondent's wife also received a note containing threats directed at her. Respondent believes the written threats are from the Mara-18. He believes he was targeted because he filed a police report after C [REDACTED] and L [REDACTED] attacked him. Respondent did not retain any of the threats or extortion notes he personally received.

B. Thomas J. Boerman, PhD.

Thomas J. Boerman, Ph.D. (Dr. Boerman) testified that Guatemala faces a different gang problem than that in the United States, both in terms of nature and scope. Guatemalan gangs are infinitely more sophisticated, violent, and entrenched in organized crime than their United States street gang counterparts. Guatemala's gang problem primarily consists of two rival gangs: the Mara Salvatrucha (MS13) and the 18th Street Gang (Mara-18). The two gangs are engaged in a variety of criminal activity ranging from simple and opportunistic to highly-organized and international. The Guatemalan MS13 and Mara-18 gangs actively attempt to reshape Guatemala's socio-political climate to achieve impunity for their criminal activities. Echoing the brutal tactics utilized in Guatemala's 36-year civil war, both gangs engage in incomprehensible levels of violence and barbarism to reach their goals. The Guatemalan civil war also created the logistics, intelligence, and contraband networks the gangs have leveraged to their benefit since the end of hostilities. Hundreds of individual gang cells or *clicas*, located throughout Guatemala also form part of the gangs' extensive social structure and contribute to its logistics and communication networks.

Both the major gangs and their ubiquitous *clicas* ascribe to a mentality based on the interwoven concepts of reputation and respect. Respect is synonymous with fear, which itself is based on the reputation of individual gang members and the gang as a whole. A gang or gang member's reputation is undermined by disrespect. Disrespect takes many forms, including cooperation with government authorities and refusal to pay the gangs' extortion demands. An individual's attempt to escape retribution is itself seen as disrespectful, because a would-be victim's escape from harm thwarts a gang objective. Once a reputation commanding respect is established, it must be feverishly defended. The failure to react to disrespect undermines one's reputation. Consequently, gangs answer any perceived disrespect toward a gang, gang member, or gang affiliate with violent, graphic, and visible reprisal. In regards to maintenance of one's reputation, Dr. Boerman noted that within the context of gang mentality, the passage of time is irrelevant. Disrespect demands reprisal regardless of how long it takes to deliver. Gangs operate with institutional memory and collective identity, ascribing to the notion that "my enemy is your enemy." Thus an individual's social association, family affiliation, or monetary connection to a gang typically suffices to warrant gang protection or retaliation on that individual's behalf.

The Guatemalan government's approach to the country's gang problem is a strategy colloquially known as *mano dura* (roughly, "heavy hand" or "iron fist"). *Mano dura* focuses on the arrest and prosecution of gang members and individuals who participate in gang activities. Dr. Boerman believes the strategy does little to address the sources of the gang problem. Although the current president of Guatemala endorses *mano dura*, some argue the strategy has exacerbated the gang problem. Dr. Boerman believes the results of *mano dura* speak for themselves: Guatemala has one of the world's highest homicide rates and its population lives in a state of civic helplessness. In contrast, the gangs' strategy of political manipulation and terror appears successful: the Guatemalan government has lost control of over 40% of its territory. Tremendous resource scarcity, the gangs' intimidation and terrorization of the police and judiciary, and overwhelming government corruption and indifference to the public's needs eclipse the capacity of well-intentioned government actors to rectify the current situation.

Guatemalan individuals not associated or affiliated with gangs generally oppose gang activity because of the gangs' toxic and disruptive effect on community life and public security. However, in part because active opposition to the gangs predictably results in violent reprisal, most Guatemalans fold to gang demands. Similarly, Guatemalans tend to believe that reporting gang activity to the police is foolhardy, futile, and dangerous, particularly in light of the gangs' strategy of terror and the Guatemalan government's limitations. Although the government is willing to prosecute certain individual gang members, it is unable to control the gang problem as a whole. The government's failure is reflected in an approximate seventy percent impunity rate for gang violence. Dr. Boerman acknowledged the impunity rate has decreased from a high of ninety percent, but stated that at seventy percent, the general consensus among Guatemalans is that the government is unable or unwilling to eliminate gang activity.

Dr. Boerman stated that Guatemala has a limited witness protection program; however, he informed the Court that witness protection is terminated at the end of the court proceedings. Additionally, due to the gang's extensive social structure, limited witness protection is insufficient to truly protect witnesses from violent gang reprisals. Similarly, Dr. Boerman again

stressed that an individual's attempts to hide from a gang does not decrease the likelihood that person will be harmed. Reprisals ordered from prison are not uncommon, and generally, lapses of time between the disrespectful incident and a gang's successful location of the disrespecting party are irrelevant.

Based on an approximately hour-long interview with Respondent and a review of Respondent's I-589 application and accompanying documents, Dr. Boerman believes Respondent will suffer egregious physical harm or death if he returns to Guatemala. Dr. Boerman acknowledged that Guatemala is, as a whole, a dangerous place, especially for those in the lower and lower-middle socioeconomic strata; however, he believes that individuals, like Respondent, who refuse to comply with gang demands and report gang activity to authorities, are at an exponentially higher risk of harm than the general population. That is, Respondent is atypical compared to the average non-gang-affiliated-Guatemalan, and his risk of harm is elevated. Respondent's flight to the United States has not decreased the likelihood he will be harmed should he return to Guatemala. In response to questions about threat letters Respondent submitted to the Court, Dr. Boerman stated that gang members do not always sign their threats.

Dr. Boerman stated that whether C [REDACTED] and L [REDACTED] are members of the Mara-18 is largely irrelevant to the analysis of Respondent's risk of harm. It is often difficult to ascertain whether a specific individual is a gang member; however, gang protection is not limited to gang members, and gangs retaliate against those who disrespect their associates as well as their members. C [REDACTED] and L [REDACTED]'s apparent affiliation with the Mara is a sufficient connection to warrant the Mara's reprisal against Respondent for his perceived disrespect. The motive for reprisal is likely mixed, based on Respondent's refusal to comply with extortion demands and his cooperation with police. If C [REDACTED] and L [REDACTED] are imprisoned or killed, the likelihood Respondent will suffer a violent reprisal for his disrespect will not likely decrease. If Respondent moves to another location in Guatemala, his risk of harm would also not appreciably decrease.

C. Doctor Katherine McKenzie

Doctor Katherine McKenzie has been a practicing, board-certified internist since 1995. Dr. McKenzie completed her medical degree and residency at the Boston University School of Medicine. She is currently an assistant professor at the Yale School of Medicine and an internist at Yale Internal Medicine Associates. In addition to her teaching and work as an internist, Dr. McKenzie performs pro bono forensic medical evaluations of asylum seekers at the Yale Center for Asylum Medicine.

In her role at the Yale Center for Asylum Medicine, Dr. McKenzie evaluates scars and injuries presented by asylum seekers to determine their likely causation; she does not determine whether an asylum seeker is truthful, but rather determines to what extent an asylum seeker's claimed mechanism of harm is consistent with apparent physical damage. Dr. McKenzie agreed that her evaluations are not diagnostic and confirmed it is impossible through forensic evaluation alone to determine whether an injury resulted from a specific trauma.

Dr. McKenzie estimated she performs approximately six forensic evaluations annually and has performed approximately 30 evaluations in her career, beginning with her first such

evaluation in 2007. She has never found any individual's physical injuries wholly inconsistent with his or her explanation of the causation of scarring or injury. On the opposite end of the consistency spectrum, Dr. McKenzie has never determined that any individual's physical injuries are diagnostic of a particular trauma.

Dr. McKenzie stated that her expertise in forensic evaluation is based in 20 years practicing as a licensed physician who regularly encounters scars and injuries. Dr. McKenzie has also received training in evaluating asylum seekers from two advocacy organizations: Health Right International and Physicians for Human Rights. Although she performed her first forensic evaluation of an asylum seeker in 2007, Dr. McKenzie first received formal training pertaining to the evaluation of asylum seekers from Health Right International in 2009. Dr. McKenzie's training in this area is ongoing. Although she receives training from advocacy groups, Dr. McKenzie does not consider herself an advocate for individual asylum seekers.

To complete her forensic evaluation of Respondent, Dr. McKenzie physically examined Respondent, read Respondent's declaration, reviewed a CT scan report and pre- and post-operative x-ray images from evaluations performed on Respondent in Guatemala, and reviewed other medical records from Guatemala from the time of Respondent's injury. In her physical examination of Respondent, Dr. McKenzie observed an eight centimeter scar extending from Respondent's left eye to his left ear, in the area of his temple. She determined the scar is consistent with a post-surgical scar. Dr. McKenzie also noted that Respondent suffers persistent neurologic damage and visual impairment in his left eye. Her objective findings of visual impairment, based on Snellen chart findings, correlated with Respondent's subjective reporting. In Dr. McKenzie's opinion, Respondent's neurologic damage and impaired vision could have resulted from either the initial blunt force trauma resulting in his injuries or the subsequent surgery to repair the injuries. Dr. McKenzie found Respondent's Guatemalan medical records consistent with his scarring and impairments. The x-ray images and CT scan report Dr. McKenzie reviewed reveal Respondent suffered a left orbit fracture and associated local swelling. Respondent's hospital records indicate he received temporary sutures in his left temple area before undergoing a subsequent surgery at a different facility to repair a left orbital fracture.

In response to questions about the scar in the area of Respondent's left temple, Dr. McKenzie testified that in her opinion, although Respondent's skin was broken when his orbit was fractured and temporarily sutured shortly thereafter, any scarring from Respondent's initial wound and the temporary repair was likely obliterated by the subsequent surgery; Respondent thus bears only one scar in the area of his injury. In Dr. McKenzie's experience, reopening a temporarily sutured wound to repair a deeper injury is common.

Dr. McKenzie concluded that the physical findings she made during her examination of Respondent are typical of the injury he described, i.e. specific and localized blunt force trauma, perhaps from the dull edge of a machete as Respondent claims. The likelihood a localized, specific orbital fracture like Respondent's would result from a blunt force blow is approximately 85 percent. Dr. McKenzie affirmed that various other unknown circumstances and/or weapons could have caused Respondent's injuries; however, she testified that although there is one mention of a car accident in Respondent's medical records, she does not believe Respondent's injury is typical of a car accident, because a car accident is more likely to result in more diffuse

findings than Respondent exhibited. She stated that in her 20 years of medical experience, she has not seen specific, localized injuries like Respondent's result from a motor vehicle accident.

III. LEGAL STANDARDS

A. Eligibility for Asylum and INA Withholding of Removal

The INA burdens Respondent with establishing his eligibility for relief from removal. INA § 240 (c)(4); 8 C.F.R. §§ 1208.13(a), 1208.16(b). To qualify for asylum, Respondent must timely file and demonstrate by a preponderance of relevant, credible evidence that he qualifies as a refugee; *id est* he is unable or unwilling to return to Guatemala "because of persecution or a well-founded fear of persecution on account of [his] race, religion, nationality, political opinion, or membership in a particular social group." INA §§ 101(a)(42)(A) (defining refugee), 208 (governing asylum). "Persecution" is harm or suffering inflicted upon an individual to punish him for possessing a belief or characteristic a persecutor seeks to overcome. *See Acosta*, 19 I&N Dec. 211, 223 (BIA 1985); *Matter of T-M-B-*, 21 I&N Dec. 775, 777 (BIA 1997) (noting even "morally reprehensible" treatment not persecution unless "on account of" one of five enumerated grounds, either actual or imputed). To establish that past mistreatment constituted persecution, an applicant must demonstrate that the harm he suffered was sufficiently serious to rise above mere harassment. *See Beskovic v. Gonzalez*, 467 F.3d 223, 225-26 (2d Cir. 2006) (distinguishing persecution from harassment); *see also Ivanishvilli v. U.S. Dep't of Justice*, 433 F.3d 332, 342 (2d Cir. 2006) (concluding persecution is the infliction of suffering or harm upon those who differ on the basis of a protected statutory ground, while harassment consists of words, conduct, or action that annoys, alarms, or causes substantial emotional distress and serves no legitimate purpose); *Chen v. INS*, 359 F.3d 121, 128 (2d Cir. 2004) (concluding non-life-threatening violence and physical abuse may constitute persecution).

Persecution takes many forms, and the determination of whether mistreatment rises to the level of persecution must be made on a case-by-case basis. *See Matter of C-Y-Z-*, 21 I&N Dec. 915, 924 (BIA 1997). Violent conduct generally goes beyond the annoyance and distress that characterize harassment and other, lesser harms. *Ivanishvilli*, 433 F.3d at 342 (citing *Chen v. INS*, 359 F.3d at 128); *accord Beskovic*, 467 F.3d at 225-26. Economic disadvantage or restriction may constitute persecution where it is deliberate and severe, exceeds the economic disadvantage generally shared by others in the country of origin, and involves more than mere loss of social advantages or physical comforts. *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007) (quoting H.R. Rep. No. 95-1452 at 7). An applicant "need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity . . . to demonstrate harm amounting to persecution." *Id.* at 173-74 ("[S]weeping limitation of opportunities...in an established profession or business may amount to persecution even though the applicant could otherwise survive."). Threats may amount to persecution if they are imminent, concrete, or so menacing as to cause significant actual suffering or harm. *Ci Pan v. U.S. Att'y Gen.*, 449 F.3d 408, 412 (2d Cir. 2006); *see Guan Shan Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 70 (2d Cir. 2002).

An applicant found to have established past persecution shall be presumed to have a well-founded fear of future persecution on the basis of his original claim. 8 C.F.R. § 1208(13)(b)(1). DHS may rebut the presumption if it establishes, by a preponderance of the evidence, that either:

(1) there has been a fundamental change in circumstances in the country of nationality rendering the applicant's fear no longer well-founded; or (2) the applicant could avoid future persecution by relocating to another part of his country of nationality. 8 C.F.R. §1208(13)(b)(1)(i)(ii). Asylum is a discretionary form of relief. INA §240(c)(4)(A)(ii).

The standard for withholding is higher than that for asylum – Respondent must establish he will “more likely than not” be persecuted if removed. See *INS v. Cardozo Fonseca*, 480 U.S. 421, 423 (1987); *INS v. Stevic*, 467 U.S. 407, 413 (1984) (holding applicant must demonstrate a clear probability his life or freedom would be threatened in the country of removal on account of a protected ground). As in an asylum claim, Respondent's establishment of past persecution creates a rebuttable presumption of future persecution. 8 C.F.R. 1208.16(b)(1). Withholding of removal, unlike asylum, is a mandatory form of relief. 8 C.F.R. 1231(b)(3).

B. Eligibility for Protection under the United Nations Convention Against Torture

To establish eligibility for protection under the United Nations Convention Against Torture, Respondent bears the burden of proving it is more likely than not he will be tortured if removed to Guatemala. 8 C.F.R. § 1208.16(c)(2). A pattern of human rights violations alone is insufficient to demonstrate eligibility for deferral of removal; instead, specific grounds must indicate Respondent's personal risk of torture. *Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000). That is, to meet his burden, Respondent must establish that an individual in his particular alleged circumstances will more likely than not be tortured if removed. *J-E-*, 23 I&N Dec. 291, 303-304 (BIA 2002); *Matter of G-A-*, 23 I&N Dec. 366, 371-72 (BIA 2002); *Matter of M-B-A-*, 23 I&N Dec. 474, 478-79 (BIA 2002). Respondent's burden cannot be met by linking a series of suppositions unless the evidence shows that each link in the hypothetical chain of events will more likely than not occur. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-918 (A.G. 2006).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Asylum

Respondent submits he was persecuted in Guatemala on account of his membership in a particular social group consisting of “Guatemalans who have defied the gang by filing a police report.” In the alternative, he asserts he was persecuted on account of an imputed anti-gang or pro-rule-of-law political opinion.

1. Timeliness of the Application

As a threshold matter, an asylum applicant must prove by clear and convincing evidence that his asylum application was filed within one year of the date of his last arrival into the United States. INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)(2). Respondent last entered the United States on or about July 9, 2013. He affirmatively filed for asylum on or about April 16, 2014. Accordingly, the Court finds Respondent's application was timely filed within one year of his arrival in the United States as required by INA § 208(a)(2)(B).

2. Credibility and Corroboration

In all applications for relief, the Court must make a threshold determination of the alien's credibility. *Matter of O-D-*, 21 I. & N. Dec. 1079, 1081 (BIA 1998). The REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005), applies to Respondent's asylum claim. Thus, after considering "the totality of the evidence, and all relevant factors," the Court must assess Respondent's credibility based on his demeanor, candor, or responsiveness; consistency or lack thereof between oral and written statements; consistency or lack thereof between Respondent's written and oral assertions and evidence of record; the entire story's inherent plausibility; and finally any inaccuracies or falsehoods Respondent puts forward, regardless of whether they go to the heart of Respondent's claim for relief. INA § 208(b)(1)(B)(iii); see *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 164 (2d Cir. 2008) ("in evaluating an asylum applicant's credibility, an IJ may rely on omissions and inconsistencies that do not directly relate to the applicant's claim of persecution as long as the totality of the circumstances establish that the applicant is not credible."); see *Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007).

An applicant's testimony may be sufficient to meet his burden of proof without corroboration if the testimony is credible, persuasive, and "refers to specific facts sufficient to demonstrate that the applicant is a refugee." INA § 208(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a); *J-Y-C-*, 24 I&N Dec. at 263. Where the Court determines the applicant should "provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant cannot reasonably obtain the evidence." INA § 208(b)(1)(B)(ii); see *Yan Juan Chen v. Holder*, 658 F.3d 246 (2d Cir. 2011) (finding undocumented alien's fear of arrest did not render him "unavailable" to testify at his wife's asylum hearing). The REAL ID Act "thus codifies the rule that an IJ, weighing the evidence to determine if the alien has met his burden, may rely on the absence of corroborating evidence adduced by an otherwise credible applicant unless such evidence cannot be reasonably obtained." *Liu*, 575 F.3d at 197.

For purposes of this decision, the Court finds Respondent credible and is satisfied that he sufficiently corroborated his testimony. In assessing Respondent's credibility, the Court considered Respondent's demeanor while testifying, as well as the rationality, internal consistency, and inherent persuasiveness of Respondent's account, and the consistency between Respondent's testimony and other evidence in the record. See *Matter of A-H-*, 23 I&N Dec. 774, 786-87 (A.G. 2005); *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989).

3. Past Persecution on Account of a Protected Ground

Respondent, through his counsel and representatives, advised the Court during proceedings that his claim did not rely on a presumption of a well-founded fear of persecution. The Court was further advised that Respondent would use the past machete attack to support both a subjective and objective well-founded fear of persecution. Respondent acknowledged to the Court that he paid extortion for a period of time, and that extortion alone does not render him a member of a valid particular social group. Respondent's political opinion claim (basis of his well-founded fear of persecution) is based on his actions in filing a police report concerning the machete attack, and the threats he received afterwards. Given Respondent's acknowledgements and the record in this case, the Court finds Respondent has not met his burden of proof of establishing past persecution on account of a statutory protected ground.

4. Well-Founded of Future Persecution on Account of a Protected Ground

The next determination is whether Respondent has a well-founded fear of persecution under 8 C.F.R. Section 1208.13(b)(2). If past persecution is established, the applicant has a presumption of a well-founded fear of future persecution. 8 C.F.R. section 1208.13(b)(1). The burden then shifts to DHS to show, by a preponderance of evidence, that the applicant's fear is no longer well founded due to either changed country conditions or the applicant's ability to safely relocate in another part of the country. 8 CFR section 1208.12(b)(1)(I). An individual who has not suffered past persecution may receive asylum if he or she demonstrates a well-founded fear that his or her life or freedom would be threatened in the future on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.13(b)(2).

As previously indicated, Respondent is not relying on a presumption of a well-founded-fear of persecution in connection with his claim. Thus, to establish his eligibility for asylum based on a well-founded fear of future persecution, Respondent must show he subjectively fears persecution and that his fear is objectively reasonable. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). In addition, Respondent must demonstrate either (1) a reasonable possibility of persecution against him as an individual or (2) a pattern or practice of persecution against persons in a group to which he belongs. 8 CFR section 208.13(b)(2); *Jian Hui Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008). An applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution. *Matter of Mogharrabi 19 I&N Dec. 328 (BIA 1987)*. Credible testimony may be enough to satisfy the subjective component, depending on the circumstances. *Diallo v. INS*, 232 F. 3d 279, 285 (2d Cir. 2000). A fear is objectively reasonable "even if there is only a slight, though discernable, chance of persecution." *Diallo*, 232 F. 3d at 284.

a. Nexus to a Protected Ground: Imputed Political Opinion

The Second Circuit has accepted the proposition that "[a]n imputed political opinion, whether correctly or incorrectly attributed, can constitute a ground of political persecution within the meaning of the [Immigration and Nationality] Act." *Chun Gao v. Gonzales*, 424 F.3d 122, 129 (2d Cir. 2005) (citing *Alvarez-Flores v. INS*, 909 F.2d 1, 4 (1st Cir. 1990)). To establish his eligibility for asylum on account of political opinion, Respondent must allege specific facts from which it can be inferred that he holds a political opinion known to his persecutor, and that the persecution occurred on account of that political opinion. See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Because Respondent's claim is premised on an imputed, rather than actual political opinion, Respondent may provide either direct or circumstantial evidence of the persecutor's motives for harming him. See *Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010); *Koudriachova v. Gonzales*, 490 F.3d 255, 264 (2d Cir. 2007) ("[T]he relevant question is not whether an applicant subjectively holds a particular political view, but instead whether the authorities in the applicant's home country perceive him to hold a political opinion and would persecute him on that basis.").

In *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007), the Court, considering the alien's testimony that she would be targeted by the Revolutionary Armed Forces of Columbia

("FARC") in the future for betraying them, held this testimony, "coupled with the government's unwillingness to control the FARC, could well qualify as persecution for an imputed political opinion (opposition to the FARC)." Respondent, relying on *Delgado*, argues that the Second Circuit recognizes an asylum applicant's well-founded fear of persecution on account of political opinion even when the authorities imputing the political opinion are not members of the government or state actors (FARC is not official Columbian government or state actor and instead an anti-government terrorist organization). Respondent argues his case is analogous to *Delgado* because the death threats he received from gang members after they discovered his reporting to police, coupled with the Guatemalan's government's inability to protect him, establishes a well-founded fear of persecution based on an imputed political opinion.

DHS contends Guatemalan criminals targeted Respondent for purely economic reasons. Relying on *Koudriachova v. Gonzales*, DHS argues that the key to whether an alien holds a subjective political view is whether the *authorities* in his home country perceive him to hold that view. See *Koudriachova*, 490 F.3d at 264. DHS maintains that Respondent has failed to demonstrate that the Guatemalan government has been deposed, the gangs form a *de facto* government, or that filing a police report in response to gang activity is akin to an act of social dissidence in Guatemala. The Court notes that Respondent in his arguments is not claiming that the Mara-18 gang is the official Guatemalan government or that they represent the government. Respondent asserts the Mara-18 views individuals like him, who challenge its authority by going to the police and seeking state protection, as expressing an anti-gang pro-government political opinion for which they seek to punish. The Court agrees with the legal arguments advanced on behalf of Respondent in connection with his imputed political opinion claim and the application of *Delgado* in his case.

Respondent credibly testified that gang members targeted him because, in addition to his failure to comply with gang demands, he twice reported illegal gang activity to police and refused to appear in court to recant his prior statements to police. Respondent testified both C [REDACTED] and L [REDACTED] had tattoos of the number 18 on their necks and arms. Respondent categorizes his opposition to the gang's demands and his attempted cooperation with Guatemalan police as political. He argues that although the gang initially targeted him for extortion, the dispute escalated and assumed a political dimension after he rejected the gang's authority by filing a police report and refusing to appear in court to recant his accusations against C [REDACTED] and L [REDACTED].

In evaluating the parties' arguments, the Court is mindful of the Second Circuit's warning against adopting an "impoverished view of what political opinions are in a country . . . where certain democratic rights have only a tenuous hold." *Osorio v. INS*, 18 F.3d 1017, 1030 (2d Cir. 1994); accord *Zhang v. Gonzales*, 426 F.3d 540, 546 (2d Cir. 2005). Respondent has established that Guatemala is such a country. Expert witness Dr. Boerman noted in his written submission to the Court that Guatemala is a "disaster" in terms of uncontrolled violence and citizen security and is, in certain respects, teetering on the edge of being a failed state. Exh. 8 at 6.

Given current conditions in Guatemala, Respondent has demonstrated that the gang likely perceived his refusal to comply with gang members' demands as a politically charged rejection of gang authority in his community. See Exh. 8 at 13 (concluding gangs perceive activity such as

reporting gang crime police as expression of anti-gang political opinion). In light of the gangs' political agendas and effective control over large areas of Guatemalan territory, the major Guatemalan gangs, and by extension their numerous *clicas*, are comparable to non-state actors engaged in asymmetrical warfare with the Guatemalan state. Exh. 8 at 12-13 (citing experts at the US Army War College and the Strategic Studies Institute). The gangs' power struggle with the Guatemalan government involves various efforts to establish political domination, on both local and national levels, to create a socio-political climate in which gangs are free to expand their ranks and operate with impunity. *Id.* Gangs engage in political activity outright, by financing elections and promoting candidates willing to facilitate the gang's objectives. Further, like traditional insurgents, the gangs utilize terror and violence to undermine the operational capacity and authority of legitimate state actors. Exh. 8 at 13.

Dr. Boerman credibly testified that Mara-18 and *clica* members view noncompliance with gang demands and cooperation with Guatemalan authorities as expressions of disrespect or challenges to gang authority. Exh. 8 at 13-14. The record makes clear that violent retaliation for disrespect, challenges, or insults to gang authority is a strategic means through which the gangs seek to maintain their socio-political control in Guatemala. Exh. 8 at 14 (noting actions that thwart gangs' objectives threaten gang authority and result in predictable, brutal reprisals).

Dr. Boerman acknowledged that there could be mixed motives for targeting Respondent. He stated that Respondent actively opposed the gangs because he: (1) refused to close his business; (2) eventually suspended extortion payments; and (3) made two reports to the police. According to Dr. Boerman, Respondent's actions would all blend together and paint a picture of Respondent as someone challenging the gangs. This sets Respondent apart from the generalized population, which is also victimized by gangs. Dr. Boerman stated the majority of the population in Guatemala would not challenge the gangs and would comply with gang demands to avoid reprisals. He also testified that the fact that Respondent reported gang activity to the police may result in more extreme retaliation against him. The Court agrees that there could be mixed motives for targeting the Respondent.

Political opinion need not be the only motive for persecution; however, Respondent must establish his persecutor's perception of his political opinion was or will be "at least one central reason" for persecuting him. INA § 208(b)(1)(B)(i); *Castro*, 597 F.3d at 103-104 ("[P]ersecutors may have 'mixed motives,' and an asylum applicant need not demonstrate that a protected ground was the exclusive reason for persecution. . . ."); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212 (BIA 2014).

Respondent has demonstrated that his imputed anti-gang political opinion will be at least one central reason gang members target him. Respondent established that in the wake of the machete attack, he received a number of written threats from gang members. *See* Exh 9. Respondent maintains he understood the threat letters as evidence of gang members' desire to kill him and his immediate family. The record indicates that Respondent continued to receive threats after he made his second report to police. The Court heard Dr. Boerman's testimony that he has seen threatening notes from gangs that have included gang monikers or *clica* names, as well as those that, like the notes here, bear no signatures or gang identifiers. Respondent testified the threats he received were from gang members because they are the only individuals who made

an attempt against his life and who wanted to kill him. Dr. Boerman opined that it was a reasonable to infer the death threats received by Respondent were connected to his attackers since he had no other apparent enemies in Guatemala. The Court finds the inference drawn by Dr. Boerman is reasonable given the entirety of the record.

b. Government Ability or Willingness to Protect

The Court is satisfied that Respondent fears persecution “at the hands of an organization or person from which the government cannot or will not protect [him]” *Aliyev v. Mukasey*, 549 F.3d 111, 116 (2d Cir. 2008) (quoting *Matter of McMullen*, 17 I&N Dec. 542, 545 (BIA 1980)). To establish his eligibility for asylum, Respondent must demonstrate his persecution would be either inflicted by the Guatemalan government or by a person or entity the government is “unwilling or unable to control.” *Acosta*, 19 I&N Dec. at 222; *see also Pavlova v. INS*, 441 F.3d 82, 91 (2d Cir. 2006). The link between Respondent’s harm and the relevant government’s inaction can be shown in various ways, including “by evidence of an inability on the part of the government to prevent the acts” or “by evidence that government actors condoned the acts.” *Aliyev*, 549 F.3d at 117 (quoting *Harutyunyan v. Gonzales*, 421 F.3d 64, 68 (1st Cir. 2005)).

Respondent’s country conditions evidence paints a grim picture of Guatemala, and supports a finding that the Guatemalan government is unable to protect Respondent from the Mara-18 or its *clicas*. *See, e.g.*, Exh. 8 at 149 (concluding Guatemala unable, unwilling, or both to hold most criminals accountable); Exh. 8 at 178 (“The country’s fragmented political system, inconsistent political will, weak judicial and security institutions remain serious obstacles to addressing the [organized crime and violence] problem adequately.”). On a local level, Respondent’s background materials clearly establish that the Guatemalan government lacks the resources necessary to combat gang violence and ensure its citizens’ safety and security. *See, e.g.*, Exh. 8 at 151 (indicating police patrols of major roadways sporadic and susceptible to suspension due to budgetary constraints); Exh. 8 at 159-160 (police forces significantly underfunded, inadequately trained, and lacking sufficient personal and logistical supplies to accomplish their mission). As for the national Guatemalan government, Dr. Boerman maintains that although there are many committed professionals of the highest integrity in Guatemala, any attempt to separate the government as a whole from organized crime and the gangs is impossible, and at best results in a false dichotomy. Exh. 8 at 10-11 (listing numerous instances of high-level official corruption and criminal activity); *see also* Exh. 8 at 54 (noting State Department’s principal human rights-related concerns include police and judicial corruption, police involvement in various crimes); Exh. 8 at 66 (finding substantial corruption in police and judiciary and noting “officials frequently engaged in corrupt practices with impunity”).

Evidence of a prompt and meaningful response by state authorities may be significant in determining whether a government is willing or able to control non-governmental persecutors. *See Matter of E-A-G-*, 24 I&N Dec. 591, 598 (BIA 2008); *see also Dias Gomes v. Holder*, 566 F.3d 232, 233 (1st Cir. 2009) (evidence that Brazilian government arrested and incarcerated persecutor indicated government was willing and able to control persecutor). Although the Guatemalan government may have made efforts to investigate and prosecute Respondent’s assailants, this attempt, in light of Guatemalan country conditions, at most suggests the government’s willingness to control the gangs. *See E-A-G-*, 24 I&N Dec. at 598. The

Guatemalan government's harsh *mano dura* strategy notwithstanding, the totality of the record establishes that the combined effects of resource scarcity, intimidation, and rampant official corruption result in the Guatemalan government's inability to protect Respondent from his persecutors. Simply put: in spite of the Guatemalan government's willingness or desire to control the gangs, the government is failing to adequately root out corruption, establish a strong rule of law, and control the gangs. Record sources credibly suggest that Guatemala's *mano dura* strategy has not only failed to control gang activity, but may well have exacerbated the problem. Exh. 8 at 7-8 (exploring scholarship on *mano dura*'s conceptual flaws and erratic implementation).

Respondent's expert, Dr. Boerman, agreed in his testimony that it does appear there was a willingness to prosecute Respondent's assailants. Dr. Boerman further testified that because of gang culture and mentality, even if Respondent's assailants were prosecuted, imprisoned, or deceased, Respondent would not be safe in Guatemala. He testified that the imprisonment of Respondent's assailants would likely inflame the assailants' gang associates and significantly increase Respondent's risk of harm. Dr. Boerman believed other gang members would act on the assailants' behalf and subject Respondent to reprisal. Dr. Boerman stated that following the completion of any proceedings Respondent participated in, the Guatemalan government would be unable to protect him. Dr. Boerman indicated that Guatemala has a limited witness protection program, but any level of protection afforded to a person is terminated at the end of proceedings, even if a person receives threats after a prosecution is completed. The Court gives significant weight to the testimony of Dr. Boerman, who believes Respondent will suffer egregious physical harm or death if removed to Guatemala.

The record does not support a finding that conditions have improved in Guatemala since Respondent's recent departure. In addition, DHS has not shown a reasonable possibility that Respondent could escape persecution by relocating within Guatemala, because the gangs' reach is national. Indeed, the record indicates Respondent continued to receive threats even after relocating to different parts of Guatemala. Dr. Boerman testified that even if Respondent relocated in Guatemala, he would not face a reduced risk of harm.

c. Findings - Subjective and Objective Fear of Future Persecution

The record reveals that Respondent's past injuries at the hands of gang members were significant: Respondent's face is visibly scarred, and surgical repair notwithstanding, he continues to experience neurological and other complications, including motor damage to the left side of his face, forehead pain, intermittent ringing in his left ear, and chronic irritation and impaired vision in his left eye. *Cf. Beskovic*, 467 F.3d at 225-26 (concluding violent conduct generally goes beyond the annoyance and distress that characterize harassment). The Court will consider the Respondent's past harm for purposes of assessing his well-founded fear of persecution claim.

The Court heard testimony from Respondent and Dr. McKenzie concerning his injuries. Respondent testified that during the attack on January 27, 2013, among other things that occurred, he was struck on his face with a machete. Respondent provided medical records and X-Rays from Honduras to corroborate his medical treatment due to the past attack against him by

gang members. *See* Exhibit 11. The record includes a reference sheet from a health facility of Tacaná, San Marcos where respondent first received medical treatment following the attack. Exhibit 8 at Tab C. The medical record indicates Respondent stated he was struck in his face with a machete; the record describes Respondent's injury as a fracture to his left eye. Respondent also provided medical records from [REDACTED] in [REDACTED], the second location at which he received medical treatment. Exhibit 8 at Tab D. The medical documentation sets forth the findings of a CAT scan, reveals a fracture of Respondent's left orbit along, and includes findings of additional medical issues. Respondent also provided intake forms and radiological records from the [REDACTED] Hospital, the third location at which he received medical treatment and where his surgery was performed. Exhibit 8 Tab F-H.

Respondent also presented the testimony of licensed physician Katherine C. McKenzie to support his application, and submitted a declaration from Dr. McKenzie addressing her medical evaluation of Respondent and the medical findings she made. *See* Exhibit 7. Dr. McKenzie concluded that the physical findings she made during her examination of Respondent are typical of the injury he described, i.e. specific and localized blunt force trauma, perhaps from the dull edge of a machete as Respondent claims. The likelihood a localized, specific orbital fracture like Respondent's would result from a blunt force blow is approximately 85 percent. Dr. McKenzie affirmed that various other unknown circumstances and/or weapons could have caused Respondent's injuries; however, she testified that although there is one mention of a car accident in Respondent's medical records, she does not believe Respondent's injury is typical of a car accident, because a car accident is likely to result in more diffuse findings than Respondent exhibited. She stated that in her 20 years of medical experience, she has not seen specific, localized injuries like Respondent's result from a motor vehicle accident. The Court would note, the medical record from the health facility Respondent first received treatment states he indicated being stricken in the face with a machete. *See* Exhibit 8 at Tab C.

In response to questions about the scar in the area of Respondent's left temple, Dr. McKenzie testified that in her opinion, although Respondent's skin was broken when his orbit was fractured and temporarily sutured shortly thereafter, any scarring from Respondent's initial wound and the temporary repair was likely obliterated by the subsequent surgery; Respondent thus bears only one scar in the area of his injury. In Dr. McKenzie's experience, reopening a temporarily sutured wound to repair a deeper injury is common. As previously indicated, the record shows that Respondent's past injuries were significant.

Because the Court has afforded Respondent a favorable credibility determination, the Court finds Respondent has satisfied the subjective component of a well-founded fear of persecution analysis in connection with his imputed political opinion claim.

Based on the documentary record, and the testimony of Respondent, country conditions expert Dr. Boerman, and medical expert Dr. McKenzie, the Court finds the record in this specific case supports the conclusion that Respondent's fear of future persecution is objectively reasonable. *See Ramsameachire*, 357 F.3d at 178. The record is sufficient to show a reasonable possibility of persecution against Respondent individually, and that a reasonable person in his circumstances would fear persecution. Based on the totality of the record, Respondent has met his burden of proof of establishing a well-founded fear of future persecution on account of a protected ground (imputed political opinion). Respondent has shown a nexus to a statutory protected ground.

Since the Court finds Respondent has established a well-founded fear of persecution on account of his imputed political opinion, the validity of Respondent's particular social group of "Guatemalans who have defied the gang by filing a police report," and his claimed membership therein, will not be addressed and reached by the Court.

d. Withholding of Removal

The Court will not reach a decision on Respondent's eligibility for withholding of removal pursuant to INA § 241(b).

e. United Nations Convention Against Torture

The Court will not reach a decision on Respondent's eligibility for withholding of removal pursuant to the United Nations Convention Against Torture.

V. ORDERS

Based on the foregoing, the following orders are entered:

IT IS HEREBY ORDERED that Respondent's Application for Asylum is **GRANTED**.

January 14, 2015
Date

Philip Verrillo
Philip Verrillo
Immigration Judge