

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, VA 22203

IN THE MATTER OF:



Respondent

In Removal Proceedings

File No.



CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (“INA”), as amended, as an alien who is 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(a); Withholding of Removal, pursuant to INA § 241(b)(3); and Withholding of Removal, under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), under 8 C.F.R. § 1208.16 (2010).

APPEARANCES

FOR THE RESPONDENT:

Jean C. Han
Counsel for the Respondent
6925-B Willow Street, NW
Washington, DC 20012

FOR DHS:

David Etches
Assistant Chief Counsel
Department of Homeland Security
901 N. Stuart Street, Suite 708
Arlington, VA 22203

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. INTRODUCTION

The Respondent is a female, native and citizen of El Salvador. She entered the United States (“U.S.”) without inspection on or about September 22, 2009, near Laredo, Texas. She was apprehended at the border. On September 26, 2009, the Department of Homeland Security (“DHS”) filed a Notice to Appear (“NTA”) charging the Respondent with inadmissibility pursuant to INA § 212(a)(6)(A)(i). On January 12, 2010, the Court granted the Respondent’s

Motion for Change of Venue and transferred the Respondent's case from San Antonio, Texas to Arlington, Virginia. The Respondent admitted the allegations contained in the NTA and conceded inadmissibility. I therefore find inadmissibility to be established by clear and convincing evidence. *See* 8 C.F.R. §1240.8(a).

As relief from removal the Respondent applies for asylum, withholding of removal under INA § 241(b)(3), and protection under Article 3 of CAT. For the reasons below, I will grant the Respondent the relief of asylum and withholding of removal under INA § 241(b)(3). I do not reach her application for protection under Article 3 of CAT.

II. ISSUES

The issues are: (1) credibility, (2) future persecution on account of a particular social group, (3) whether the government is unable or unwilling to protect the Respondent against the persecution, and (4) internal relocation.

III. LEGAL STANDARDS

The INA, as amended by the REAL ID Act of 2005, governs this case because the Respondent initially filed Form I-589 on or after May 11, 2005. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). An applicant for asylum has the burden of proof on her applications. Consequently, the applicant's credibility is very important and may be determinative. Generally, the applicant must testify in detail, plausibly, and consistently. INA § 240(c)(4)(C). The applicant should satisfactorily explain any material discrepancies or omissions. *Id.*

In all applications for asylum, I must make a threshold determination of the alien's credibility. *See Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). I may grant an application solely on the basis of testimony that is credible, persuasive, and specific, without further corroboration. 8 C.F.R. § 1208.13(a); *see also Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987). However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided. *See Matter of S-M-J-*, 21 I&N Dec. 722, 725-26 (BIA 1997); *see also Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998). If such evidence is unavailable, the applicant must explain its absence, and I must ensure that the applicant's explanation is included in the record. *See Matter of S-M-J-*, 21 I&N Dec. at 725-26.

In making a credibility determination, I will consider the totality of the circumstances and all relevant factors. *See* INA § 208(b)(1)(B)(iii); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007). I may base a credibility determination on the applicant's demeanor, and the inherent plausibility of the account. *Matter of A-H*, 23 I&N Dec. 774, 786-87 (AG 2005). I may also consider the consistency between written and oral statements (whenever made, whether or not under oath, and considering the circumstances under which such statements were made), the internal consistency of each such statement with other evidence in the record (including Department of State Country Reports), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. INA § 208(b)(1)(B)(iii).

Even if the applicant presents her claim in a manner that prompts an adverse credibility finding, I will evaluate the record as a whole to determine whether independent evidence establishes her claims. *See Camara v. Asheroft*, 378 F.3d 361 (4th Cir. 2004). However, the Court of Appeals for the Fourth Circuit has clarified that affidavits from friends and family are not the independent evidence on the record that *Camara* contemplates. *See Gandziami -Mickhou v. Gonzales*, 445 F.3d 351 (4th Cir. 2006).

To be eligible for asylum, an applicant must show that she is unwilling or unable to return to her native country because of past persecution or an objectively reasonable fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 208(b)(1). Under this generous standard, I may grant asylum when the chance of future persecution is as low as 10%. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

The applicant must present direct or circumstantial evidence of a motive that is protected under the Act. The protected ground cannot play a minor role in the applicant's fear of future mistreatment. That is, it cannot be incidental, tangential, superficial, or subordinate to a non-protected reason for harm. Rather, it must be a central reason for persecuting the applicant. The motivation of the persecutors involves questions of fact, and the burden can be met by testimonial evidence. *Matter of S-P-*, 21 I&N Dec. 486, 490 (BIA 1996). Supporting documents and corroborative background evidence also "must be taken into account." *Id.*

To establish a well-founded fear of persecution, the applicant must present credible testimony that demonstrates that: 1) she possesses a belief or characteristic a persecutor seeks to overcome by means of punishment of some sort; 2) the persecutor is already aware, or could easily become aware, that she possesses this belief or characteristic; 3) the persecutor has the capability of punishing applicant; and 4) the persecutor has the inclination to punish her. *See Matter of Mogharrabi*, 19 I&N Dec. at 446; *see also Matter of Acosta*, 19 I&N Dec. 211, 226 (BIA 1985)(*abrogated on other grounds by INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

In an asylum application based on well-founded fear, the regulations place the burden on the applicant to show that there is no reasonably available internal relocation in her native country unless the feared persecution is by the government or government-sponsored. 8 C.F.R. § 1208.13(b)(3)(i). In the latter situation, I must presume countrywide persecution unless the DHS establishes that there is a reasonably available internal relocation alternative under the regulatory guidelines. 8 C.F.R. § 1208.13(b)(3)(ii).

In exercising discretion, I generally will grant asylum to eligible aliens in the absence of egregious adverse discretionary factors. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996). Under the regulations, I must give special consideration to cases in which the applicant qualifies for withholding of removal, but the applicant's spouse and/or minor children would be stranded abroad by a discretionary denial of asylum. 8 C.F.R. § 1208.16(e).

IV. SUMMARY OF CLAIM AND EVIDENCE

A. *The Respondent's Testimony*

On May 20, 2011, the Respondent testified to the following: The Respondent was born in El Salvador and is a citizen of that country. She grew up in Soyapongo, El Salvador, and has also lived in the towns of [REDACTED] and [REDACTED]. The respondent's family home is in a suburban neighborhood called [REDACTED] which is within MS-13 (also called "the MS" or "the mara salvatrucha") gang territory, but on the border with M-18 gang territory. M-18 members would be killed if they entered [REDACTED]. The Respondent has seven siblings, and she believes that her late brother [REDACTED] was a member of the M-18 gang.

Although the Respondent never asked [REDACTED] whether he was a gang member, their sister [REDACTED] who lived with [REDACTED] told the Respondent that [REDACTED] was a member of M-18. [REDACTED] also told the Respondent that [REDACTED] had an M-18 tattoo on his head, though his long hair normally concealed it. [REDACTED] lived in [REDACTED], which is roughly ten minutes by foot from [REDACTED]. The Respondent believes that MS-13 has targeted her family for retaliation due to [REDACTED]'s M-18 gang involvement and the location their family home in MS-13 territory.

Threats against the family began in approximately in the year 2000 when MS-13 gang members would follow [REDACTED] home from school, once causing her to hide at a classmate's house until they left. They would also wait outside [REDACTED]'s home to taunt her; threatening to rape her, "make keychains out of her eyes," and "chop off her head and deliver it to [REDACTED]" One of the people who tormented [REDACTED] was an MS-13 member named [REDACTED] who was later convicted of killing the Respondent's other sister, [REDACTED]. [REDACTED] also received threats via phone telling her that they were going to kill her or her nephew, [REDACTED], whom they knew by name. In response to these threats [REDACTED] moved to San Joaquin to live with [REDACTED].

In January 2003, the Respondent's brother [REDACTED] was fatally shot in the chest and back while he was waiting for a bus near [REDACTED]. Although there were witnesses, the Respondent believes that they were too afraid to come forward and the police did not investigate because they dismissed the case as the death of "just another gang member."

On [REDACTED], [REDACTED] the Respondent's sister [REDACTED] was fatally shot while she was walking to school with a classmate around 7:00 AM. The murder was widely known, and prompted television and radio reports, as well as publicity from Salvadoran newspapers like *Diario de Hoy* and *La Prensa*. The family received condolence flowers from the President. Although the Respondent never spoke with reporters, her mother did. The Respondent's mother was misquoted as saying that members of M-18 had killed [REDACTED]. See Group Exhibit 4, Tab O. Rather, the family believes that MS-13 gang members killed [REDACTED].

The police investigated [REDACTED]'s death due to societal pressure and, though they initially apprehended two MS-13 gang members, the police released one because they concluded that person had only been an accessory. An MS-13 member named [REDACTED] was tried and sentenced to fifteen years in prison based on confidential eye-witness testimony. The witness went into

hiding and remained anonymous due to fear of retaliation by MS-13. The Respondent did not attend the trial because she was afraid of being recognized and targeted by MS-13, but the Respondent's mother did attend the trial because she wanted to see the conviction in person. The Respondent's mother said that [REDACTED] noticed her and, at the moment she was convicted, [REDACTED] looked at the Respondent's mother with so much hatred that she became afraid that [REDACTED] was going to kill her. The trial was highly publicized, and both Salvadoran President Sacá and President Flores mentioned [REDACTED]'s death in their public speeches about gang control initiatives.

The Respondent's mother briefly received protection from the police who would accompany her to places like the grocery store. The Respondent's mother eventually declined police protection, however, because she did not want to attract attention to herself. She knew that the protection would only last for a few months, and she believed that having police with her temporarily would make it easier for MS-13 to identify her and her family as targets once the protection stopped. Additionally, the police only offered protection to the Respondent's mother and this protection was inadequate to protect the entire family.

After [REDACTED]'s conviction, the Respondent, her sister [REDACTED], her grandmother, and her mother all received threats by phone. The Respondent recalls receiving death threats every other week, even after she changed her cell phone number. In one instance, the Respondent received a call at the hotel where she works telling her that they had killed her sister [REDACTED] and threatening her by saying "you are next." During another incident in 2009, someone contacted the Respondent's mother and threatened to kill the Respondent's sister [REDACTED] if she did not give up \$5,000. Most recently, in August 2011, the Respondent's great-grandmother received a call asking about [REDACTED] which is the Respondent's mother's name. When the Respondent's grandmother replied by saying that she "did not know anyone by that name," the caller stated "we know she is your daughter." The Respondent believes that this call demonstrates that MS-13 members are waiting for the right time to kill everyone in her family.

The Respondent and her mother have also received threatening notes. On three occasions in 2009 the Respondent received notes telling her that "she was next." She found these notes either on her doorstep or inside of her house, and they were each written using letters cut out from a newspaper. The final note, which she found in May 2009, stated "you will be the next one, we always avenge our blood." The Respondent never saw who left the notes. The Respondent recalls shaking with fear when she read one of these notes because she knew she would be killed. The Respondent believes that MS-13 is capable of carrying out these threats.

The Respondent has never called the police because she believes that they would not take the threats seriously. She also believes that most people do not report crimes in El Salvador because the police normally do not take action.

The Respondent's family has changed their lifestyle in response to these threats. The Respondent stopped going out, and constantly tried to keep herself surrounded by people. She is particularly concerned about the safety of her children, and she is always aware of who is near her when she is in public. The Respondent's sister [REDACTED] believed that MS-13 monitored her so closely that they knew which bus number she rode, so [REDACTED] stopped working and stopped

going out. The Respondent's mother has moved twice, once to a town 30-45 minutes by car away from ██████████ called ██████████

The Respondent initially struggled with whether to leave El Salvador because she was concerned about her children and her family. Although her husband did not initially agree that she had to leave, he ultimately concluded that she "had to do something or else [she] would be killed." He told her that her children would be better off with her alive in the U.S. than dead in El Salvador. So, the Respondent fled to the United States alone.

B. Documentary Evidence

The record includes the Respondent's Notice to Appear, filed October 9, 2009 (Exhibit 1); the Respondent's Motion for Change of Venue, filed December 16, 2009 (Exhibit 2); the Respondent's Form I-589, Application for Asylum and for Withholding of Removal filed on May 20, 2010 (Exhibit 3); the Respondent's Exhibits: Part A (Tabs A-V), filed on September 26, 2011 (Group Exhibit 4); the Respondent's Exhibits: Part B (Tabs W-OO), filed on September 26, 2011 (Group Exhibit 5).

V. FINDINGS AND ANALYSIS

A. Credibility and Corroboration

I find the Respondent credible. I find that her testimony was reasonably detailed, plausible, and generally consistent with her application and with documented background conditions. *See* INA § 240(c)(4)(C). The Respondent testified in court and I had an opportunity to observe her demeanor. On the basis of those observations, I believe that the Respondent testified candidly and answered questions truthfully during direct and cross-examinations. She spoke with specificity about the numerous threats that she and her family received, and she credibly relayed the details of the events which provide a basis for her asylum claim. *See also INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (requiring a specific and detailed claim). Further, DHS concedes that the Respondent is credible.

The Respondent also submitted objective evidence to corroborate her claim. Numerous media articles report that an MS-13 gang member named ██████████ killed the Respondent's sister ██████████ and was sentenced to fifteen years in prison. *See e.g.*, Group Exhibit 4, Tab S; *see also* Group Exhibit 4, Tabs N-V. Further, the deaths of the Respondent's brother and sister by gunshot wound are substantiated by death certificates and autopsy reports. *See* Group Exhibit 4, Tabs J-M. Consistent with the Respondent's description, the media reports surrounding the death of the Respondent's sister also document the culture of fear among those who live in the ██████████ neighborhood and the prevalence of gang violence. *See e.g.*, Group Exhibit 4, Tab P (stating "The residents of this zone fear the gangs so much they do not dare reveal their names after describing this fear because of the tormenting presence of the gangs."). The U.S. State Department's *2010 Human Rights Report: El Salvador* ("2010 Country Report") confirms the existence of gang violence and documents several gang-related killings. Thus, in light of the record as a whole, I find the Respondent credible.

B. *Asylum*

1. *One-Year Bar*

Applicants for asylum must show that they filed their application within one-year of entering the U.S. INA § 208(a)(2)(B). The Respondent entered the U.S. on or about September 22, 2009 and filed her asylum application on May 20, 2010. I find that the Respondent has filed her asylum application within one year as required.

2. *Well-founded Fear of Future Persecution*

I find that the Respondent has demonstrated a well-founded fear of future persecution in El Salvador because she reasonably fears that she will be killed by the MS-13 gang if she were to return. I find that she has established a genuine subjective fear, and that this fear is objectively reasonable. *See Cardoza-Fonseca*, 480 U.S. at 430-31. I do not reach a conclusion regarding whether the Respondent has experienced past persecution.

The Respondent's subjective fear is established by her credible testimony and her written statement. She testified that she received multiple written death threats that caused her to fear for her life. She stated that her fear is informed by the genuine belief that MS-13 has the capacity to carry out its threats. The Respondent's written statement also speaks of her being "constantly threatened" and "stalked" by members of MS-13 such that she "almost never went out" when she was in El Salvador. Group Exhibit 4, Tab B. Fear of being killed caused the Respondent to leave her husband and her family in El Salvador and undertake a month-long trip through Guatemala to cross the border into the U.S. on foot. *Id.* Thus, I find that the Respondent has a genuine subjective fear of future persecution.

The Respondent also presented substantial evidence that her fear of future persecution is objectively reasonable. The objective reasonableness of the Respondent's fear is demonstrated by the murder of her sister by MS-13, statements from the Respondent's family, and extensive reports documenting the prevalence of gang violence in Salvadoran society. That MS-13 has already successfully carried out at least one death threat against the Respondent's family suggests their sincerity. Additionally, the Respondent received threats until very shortly before she came to the United States, the family continues to receive threats, and the Respondent's husband's states that he is "worried that if his wife returns to the country she will be found and killed." Group Exhibit 4, Tab E. In addition to the discussion of gang-related killings in the 2010 Country Report, experts observe that the "threat of murder by members of a 'rival' gang is not only a source of legitimate fear for gang members themselves, but also for those . . . having acquaintances in a gang, or simply living in the wrong area." *Id.* Indeed, likely targets of gang violence include individuals "whose relatives are gang members." *Id.*

Considering the record evidence, I find that the Respondent has met her burden to show that she has a well-founded fear of future persecution.

3. *On Account of Particular Social Group*

I find that the Respondent's fear of future persecution is on account of her membership in a particular social group comprised of members of her family. *See Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (holding that a family who was targeted for persecution by a Salvadoran gang constitutes a particular social group under the INA). The Respondent, together with her mother, sisters, and numerous other family members all received targeted threats from MS-13 gang members who unequivocally indicated their intent to kill all members of the ██████████ family. *See* Group Exhibit 4, Tab D (asserting that MS-13 members have stated that they intend to kill the ██████████ and "will stop only with the last member of the family"); *see generally* Group Exhibit 4, Tabs B-G. Indeed, MS-13 members succeeded in killing the Respondent's sister, ██████████. *See* Group Exhibit 4, Tabs N-V. The location of the Respondent's family home in the ██████████ neighborhood within MS-13 territory, as well as her brother's membership in the rival M-18 gang, appear to have provoked the attacks. Moreover, after a MS-13 gang member was convicted of killing the Respondent's sister, ██████████ the threats against the ██████████ family became "constant." *See* Group Exhibit 4, Tab B. The consistency and systematic nature of the family-wide threats, the presence of known members of MS-13 during the threats and ██████████'s murder, as well as the correlation between the threats and the conviction of a MS-13 member for ██████████'s death all support the conclusion that the ██████████ family has been targeted for persecution as a social group by MS-13.

4. *By Either the Government or a Group the Government is Unable or Unwilling to Control*

I find that the Salvadoran government is unable to control the violence and instability promulgated by Salvadoran gangs like MS-13. The 2010 Country Report states generally that "inadequate training, insufficient government funding, lack of a uniform code of evidence, and isolated instances of corruption and outright criminality" undermine the effectiveness of the Salvadoran police. Group Exhibit 4, Tab NN. Additionally, the U.S. Congressional Research Service has noted that "government-sponsored gang prevention programs have tended, with some exceptions, to be small-scale, ad-hoc, and underfunded" and observed that rehabilitation programs for former gang members have been even less successful. *See* Group Exhibit 4, Tab Z. The same report notes that *most* youth arrested under "Mano Dura," a government-sponsored attempt to address gang activity in El Salvador, have been released. *Id.* Indeed, experts conclude that rule of law in El Salvador has "failed" to address the rise of gangs. *See* Group Exhibit 4, Tab HH.

5. *Internal Relocation*

I find that the Respondent has no reasonable internal relocation alternative available to her. *See* 8 C.F.R. § 1208.13(b)(2)(ii). The Respondent testified that she is afraid to return to any part of El Salvador. Given the widespread reach of MS-13, and the small size of El Salvador, it is unreasonable to conclude that the Respondent could relocate to avoid being persecuted. *See* Group Exhibit 4, Tab Z (examining transnational gangs like MS-13 and finding that they have "expanded geographically and become more sophisticated" such that imprisoned MS-13 gang members in El Salvador have ordered retaliatory assassinations to be carried out thousands of

miles away in Northern Virginia, U.S.). Moreover, that the Respondent's mother has moved twice in El Salvador and continues to receive threats further supports the conclusion that internal relocation is not a viable alternative. See Group Exhibit 4, Tab D ("[I]t is distressing to move constantly . . . because whichever place they move they will be exposed such that the MS-13 can find them and fulfill that which they have threatened."). Lastly, the national media coverage of the Respondent's sister's murder trial further supports the conclusion that the [REDACTED] family is known nationwide and could be targeted by MS-13 anywhere in El Salvador. See Group Exhibit 4, Tabs N-V. I find that an internal relocation alternative is not available to the Respondent.

6. *Discretion*

I find no egregious adverse factors warranting a discretionary denial of asylum. See *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); see *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). The Respondent has no criminal history of which I am aware, and nothing in the record suggests that she will not live a productive, law-abiding life in the U.S. I therefore exercise my discretion to grant her application for asylum.

C. *Withholding of Removal under the Act.*

Due to the reasons stated above, I find that the Respondent has established that it is more likely than not that she will be persecuted if she were to return to El Salvador. 8 C.F.R. § 1208.16(b)(a)(A)(iii). The Respondent has established that a reasonably available internal relocation alternative could not eliminate her fear. See § 1208.16(b)(2). Therefore, I grant her withholding of removal under the Act. See 8 C.F.R. § 1208.16(b).

D. *Relief under Article 3 of CAT*

Because I grant the Respondent's application for asylum and withholding of removal under the Act, I do not reach her application for withholding of removal under Article 3 of CAT.

VI. CONCLUSION

I find the Respondent inadmissible as charged. I find her credible. On the basis of her credible testimony and other evidence, I find it more likely than not that she will be persecuted on account of her membership in a particular social group if she were to return to El Salvador. I exercise my discretion to grant her application for asylum. I grant the Respondent's application for asylum and withholding of removal under INA § 241(b)(3). I do not reach her application for protection under Article 3 of CAT.

Consequently, I enter the following order:

ORDER


It is Ordered that:

Respondent's application for asylum under INA § 208(a) be **GRANTED**.

It is Further Ordered that:

Respondent's application for withholding of removal under INA § 241(b)(3) be **GRANTED**.

6/21/12
Date


Paul Wickham Schmidt
United States Immigration Judge