

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
Immigration Court  
El Paso, Texas

File No.: A75-244-012

IN THE MATTER OF: )

Hessmir Sharon Orozco-Polanco )

RESPONDENT )

IN REM

Political opinion +  
social group

CHARGES: § 212(a)(6)(A)(i) of the Immigration and Nati

APPLICATION: Asylum; Restriction on Removal

ON BEHALF OF RESPONDENT:

Marlene Perrotte, RSM

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WRITTEN DECISION OF THE IMMIGRATION JUDGE

The respondent is a seventeen-year-old boy, a native and citizen of Guatemala. He entered the United States on March 25, 1997, at or near Laredo, Texas. On April 24, 1997, the Immigration and Naturalization Service ("Service") commenced removal proceedings against the respondent pursuant to its authority under section 240 of the Immigration and Nationality Act ("Act") by filing a Notice to Appear ("NTA") (Exhibit 1) with the Immigration Court in El Paso, Texas. The NTA charges that the respondent is subject to removal pursuant to § 212(a)(6)(A)(i) of the Act in that he is an alien present in the United States without being admitted or paroled.

During the course of these proceedings, respondent has admitted the factual allegations contained in the NTA and conceded deportability as charged. Based on these admissions, I find

that removability has been established by clear and convincing evidence. See § 240(c)(3)(A) of the Act. Respondent has declined to designate a country for removal; the court has designated Guatemala. In lieu of removal, respondent has applied for asylum. The court will consider this application to also be an application for restriction on removal.

#### SUMMARY OF FACTS

The respondent testified, in pertinent part, as follows:

The respondent comes from a low-income family in the El Bordo neighborhood in the Guatemalan city of Zacapa. In the neighborhood, there is an organized gang of male youths, which is known as the El Bordo gang and is affiliated with the MS-13, one of the two major gangs in Guatemala. In addition to Guatemala, the MS-13 gang has links in El Salvador and the United States. The El Bordo gang members cultivate a distinctive appearance, wearing big pants, shaving their heads, and having tattoos. In a nearby neighborhood is a gang affiliated with the MS-18, the other major national gang in Guatemala. The members of this rival gang, which is called the Poporopos, dress like cowboys and wear seven-inch belt buckles.

The respondent, who has never belonged to any gang, had his first major encounter with gang violence when he was ten years old. At that age, on two separate occasions, he was beaten severely by members of the Poporopos gang. Each time, approximately fifteen to twenty youths beat the respondent, using their hands, belts, and bats. After each beating, it took him about thirteen to fifteen days in bed to recover from his injuries. The reason for the beatings, which took place when the respondent was outside of the El Bordo neighborhood, was that the Poporopos members, knowing him to come from El Bordo, believed him to be a member of the El Bordo gang.

Most of the male youths in the El Bordo neighborhood do belong to the El Bordo gang, which carries out various activities. The gang members rob and steal, use drugs, sell drugs, and have violent confrontations with other gangs, particularly the Poporopos gang. Over the years, the El Bordo gang tried many times to get the respondent to join the gang, but he always refused. He told the El Bordo gang members that he did not share their values. The respondent disliked many things about the gang: the way the gang members treated each other; their use of drugs; their involvement in drug trafficking; and the way they treated other people.

Instead of participating in a gang, the respondent worked and attended or tried to attend school. Although respondent began working 48 hours a week in the only bakery in his neighborhood when he was nine years old, he nevertheless managed to complete his primary school education. After primary school, when the bakery in the El Bordo neighborhood had closed down, the respondent began working in another bakery in a different neighborhood, one dominated by the Poporopos gang. While working, the respondent repeatedly attempted to attend high school - going for six months in 1994, six months in 1995, and three months in 1996 - because he wished to advance in his studies. Because there was no high school in the El Bordo neighborhood, he had to go to other neighborhoods to go to high school. Thus, the respondent had to go outside of the El Bordo neighborhood for both work and school.

Although the respondent refused to join the El Bordo gang, members of the Poporopos gang continued to treat him as an El Bordo member because they knew that he came from the El Bordo neighborhood. Whenever the respondent went back and forth from his neighborhood to school or work, he was tormented by fears of being jumped by Poporopos members. When he encountered them, he was sometimes able to run away but sometimes was caught and beaten

severely. The harassment and violence became so common in his life that he had nightmares, in which he was chased by armed people, and frequent severe headaches.

In addition to the beatings, the respondent was once shot by the Poporopos gang. In August 1994, the respondent was at a dance when about twenty members of the Poporopos gang entered and shot at the respondent and the three friends he was with, all of whom were also from the El Bordo neighborhood but not part of the El Bordo gang. The respondent was hit in the right leg, above the knee. The respondent had to go to the emergency room, and it took about three months to recuperate.

The respondent never asked the police for help with his problems with the Poporopos gang, because the police did not do anything useful to protect people. Sometimes other people called the police, when rival gangs were having violent confrontations in the streets, but the police never arrived until after the violence was over.

The respondent testified that, rather than working for a living and suffering many beatings because he had no one to protect him, it would have been easier for him to join the El Bordo gang. However, the respondent testified, his desire has always been to be a "straight person," and not to be in a gang or involved with drugs.

The respondent did eventually acquire some protection, from the pastor of the Assembly of God church, which the respondent joined after the pastor heard of his situation from the respondent's aunt. The pastor began walking the respondent home from work. Every night after work, the respondent attended church meetings. At the meetings, those present studied the Bible and, among other things, talked about gangs. They discussed how bad the gangs were, for instance in that the gang members abused their bodies with drugs and treated other people badly.

Following a severe confrontation between the El Bordo and Poporopos gangs in the El Bordo neighborhood in August 1996, the respondent's family decided to move to Coban, another city in Guatemala. They moved in September, and the respondent found work in a hotel. He worked during November and December of 1996, but quickly discovered that there was also a lot of gang violence in Coban. Again, without anyone to protect him, the respondent was scared all the time that he was out in the streets. His fear became so great in January 1997 that he stopped going to work, and instead stayed in the home all the time, locking himself in. Finally, in February, he decided to leave Guatemala and travel to the United States.

After traveling through Mexico, the respondent arrived in the United States at Laredo, Texas. He was detained there by the Service, which transferred him to the Southwest Keys Juvenile Detention Facility in El Paso, Texas.

At the juvenile facility, the respondent encountered two members of the El Bordo gang: Miguel Angel de la Rosa and Osbel Asarel Penito. The respondent was trying to follow what he called the "house rules" of the facility. In contrast, the gang members did not obey the rules, and told the respondent not to obey the rules and instead to hang around with them. The respondent refused, and continued abiding by the house rules. In retribution, de la Rosa and Penito threatened to kill the respondent. They told the respondent that if he were ever to go back to Guatemala, they would kill him.

Since then, the respondent has been in contact several times with a friend of his back in El Bordo. The friend has told him that she has talked to de la Rosa and Penito, who are apparently now back in Guatemala, and they have repeated the death threat.

APPLICABLE LAW

The respondent bears the evidentiary burdens of proof and persuasion in any application for asylum under § 208 of the Act or restriction on removal under § 241(b)(3) of the Act. See Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); 8 C.F.R. § 208.13(a) (1997); 8 C.F.R. § 208.16(b) (1997).

To be eligible for restriction on removal pursuant to § 241(b)(3) of the Act, an alien's facts must show a clear probability of persecution in the country designated for removal, on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). This means that the alien's facts must establish that it is more likely than not that he or she would be persecuted for one of the grounds specified. See id.

To be eligible for asylum under § 208 of the Act, an alien must meet the definition of a "refugee," which requires him or her to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. See § 101(a)(42) of the Act; § 208 of the Act. The burden of proof required to establish eligibility for asylum is lower than that required for restriction on removal. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). The Board of Immigration Appeals ("Board") has held, adopting the view of the United States Court of Appeals for the Fifth Circuit, that an applicant for asylum has established a well-founded fear if he or she shows that a reasonable person in his circumstances would fear persecution. See Matter of Mogharrabi, 19 I&N Dec. 439, 335 (BIA 1987); see also Guevara-Flores v. INS, 786 F.2d 1242 (5th Cir. 1986),

cert. denied, 480 U.S. 930 (1987). The Supreme Court has held that an applicant must demonstrate both subjective and objective elements of the fear, i.e., both that the fear is actual and genuinely held and that it is objectively reasonable. See Cardoza-Fonseca, supra, at 430-31.

Further, under § 208 of the Act, the decision on an application for asylum is a matter of discretion. Thus, even when an applicant is eligible for asylum, he or she must nonetheless show worthiness of a favorable exercise of discretion.

In contrast, the court is required, pursuant to § 241(b)(3) of the Act, to withhold removal if the court determines that the applicant's life would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. § 241(b)(3) is a mandatory provision which entitles the applicant to withholding of removal if he or she shows that the feared persecution is more likely than not to occur. See INS v. Stevic, supra.

With regard to the factor of membership in a particular social group, the BIA has defined persecution on account of such membership as

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.

Matter of Acosta, supra, at 233. The characteristic which the members of the group have in common must also 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." *Id.*

#### APPLICATION OF LAW TO FACTS

In the following analysis, the testimony of the respondent and all supplementary documentation have been considered, even if not specifically discussed below.

The respondent testified at great length during the hearing, with the assistance of an interpreter. I carefully observed the respondent's demeanor. I found him to be a young man who is sincere and responsive to questions and who testified in a compelling fashion. I also found his testimony to be consistent and generally in accord with his written application. He was careful and deliberate in his testimony. He recounted significant events clearly. He amplified his application for asylum with his testimony. Any gaps in his testimony occurred only in matters which were, in the Court's opinion, not significant. The court is satisfied that the respondent told the truth regarding the events which transpired in Guatemala and the United States. Therefore, I find respondent's testimony credible and deserving of full evidentiary weight.

There are two potential groups by whom the respondent may possibly be said to have been persecuted: the Poporopos gang, affiliated with the M-18 national gang, and the El Bordo gang, affiliated with the M-13 national gang. Neither group operates under the explicit authority of the Guatemalan government. However, the testimony of the respondent and, more importantly, the documentary evidence submitted by the respondent demonstrate that in Guatemala such gangs operate largely unhindered by the police or judicial system. Therefore, any acts of persecution by the Poporopos gang or the El Bordo gang are potentially within the qualifying range of persecution because they are committed by groups that the government is unwilling or unable to control. See, e.g., *Adebisi v. INS*, 952 F.2d 910, 914 (5th Cir. 1992); *Matter of Kasinga*, Interim Decision 3278 (BIA 1996).

To begin with the Poporopos gang, the Court finds that the treatment of the respondent by that gang would constitute past persecution on account of imputed membership in a social group, were it not that the persecution did not extend country-wide. First, the things that the Poporopos



gang did to the respondent were acts of persecution: the gang members twice beat him so severely with belts, bats, and hands that he was in bed for a fortnight recuperating; separately, they for years chased him in the streets and sometimes beat him severely, making his life such a torment that he had frequent severe headaches and nightmares of violence; and they once shot him in the leg, for which he had to go to the emergency room and from which injury he took three months to recuperate.

Second, the Poporopos gang performed these acts of persecution because they regarded him as a member of the El Bordo gang since he came from the El Bordo neighborhood. Just as being a former member of a national police force is an immutable characteristic, since it is one beyond the capacity of a person to change once acquired, see Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988), so, too, being someone who "comes from" a particular area is an immutable characteristic, since it is beyond the capacity of a person to change once acquired. Thus, the Poporopos gang members persecuted the respondent on account of his membership in the particular social group of young males who come from the El Bordo neighborhood.

However, respondent's eligibility for asylum in this regard must fail because any threat to the respondent from the Poporopos gang neither was nor is country-wide. See Matter of C-A-L-, Interim Decision 3305 (BIA 1997); Matter of R-, 20 I&N Dec. 621, 625-26 (BIA 1993); see also Abdel-Masih v. INS, 73 F.3d 579, 586-87 (5th Cir. 1996). The respondent was able to remove himself from the torment and beatings of the gang by moving to another city, Coban. Although the respondent there felt himself to be in danger from other gangs, largely through the general lawlessness of low-income Guatemalan urban areas, he did not testify that he was in danger in Coban from Poporopos gang members or members of M-18, the national gang with which the

Poporopos gang is affiliated. Nor is there any reason to expect that the respondent would be in such danger if he were to return to anywhere in Guatemala but his home city of Zacapa, since there is no evidence to show that the Poporopos gang had any stronger motive to torment respondent than that of his membership in the particular social group of young males who come from the El Bordo neighborhood. That is, there is no reason to believe that the animus of the Poporopos gang against the respondent was or is strong enough that the gang would use its national affiliations to attempt to persecute respondent if he were to return to live in any city other than Zacapa. Thus, respondent's claim to asylum on account of the treatment of him by the Poporopos gang fails.

However, turning to the El Bordo gang, the Court finds that the respondent has met his burden of showing that he has a well-founded fear that, were he to return to Guatemala, he would be persecuted by the El Bordo gang on account of his political opinions and/or membership in a particular social group. First, the Court concludes on the basis of respondent's testimony, demeanor, and documentary evidence that the respondent does have a subjective fear of persecution if he returns to Guatemala. The respondent is very aware of the violent power of gangs, having been personally harassed, chased, beaten, and shot by gang members and having witnessed many violent confrontations between members of rival gangs. Because of his actions at the juvenile facility, the respondent has been threatened with death, a threat that the makers care enough about that they have repeated it even after being sent back to Guatemala. Moreover, respondent's fearfulness was clear during the court hearing. While testifying about gang violence and threats, especially those which had been directed specifically at him, the respondent was extremely emotional. His anguish was so strong that at times he had trouble speaking. The

respondent broke down crying during key portions of his testimony. In respondent's mind, his fear is real and genuine. Thus, respondent satisfies the subjective component of the well-founded fear element.

Next, the Court finds that the respondent satisfies the objective component of the well-founded fear element because he has shown that a reasonable person in his circumstances would fear persecution on account of his membership in the particular social group of young, poor male Guatemalans who believe in the rule of law, in earning an honest living, and in not participating in illegal activities such as drug-trafficking and the use of violence. Because of his membership in this particular social group, the respondent satisfies the four-part test of Matter of Mogharrabi, *supra*, at 446, for a well-founded fear of persecution: (1) he has a characteristic, as a member of this particular social group, that the El Bordo gang would seek to overcome in him by violence; (2) the El Bordo gang is aware, through the respondent's behavior in El Bordo and at the juvenile facility in the United States, that the applicant is a member of this particular social group; (3) the El Bordo gang is capable, on its own or through its national affiliations, of punishing the respondent for his membership in this particular social group; and (4) the El Bordo gang has the inclination to punish the respondent, as indicated by the repetition of the death threat against the respondent, even once the utterers of the threat were back in Guatemala.

That the respondent qualifies for asylum because he is a member of the particular social group of young, poor male Guatemalans who believe in the rule of law, in earning an honest living, and in not participating in illegal activities such as drug-trafficking and the use of violence is illuminated by the discussion of "particular social group" in Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993). In that case, an Iranian woman claimed to face persecution as a member of

the particular social group of Iranian women who refused to conform to the Iranian government's gender-specific laws and social norms: that is, the social group of those Iranian women who found the laws involved so abhorrent that they refuse to conform to them, even though the penalties for noncompliance were "74 lashes, a year's imprisonment, and in many cases brutal rapes and death." The Court of Appeals for the Third Circuit stated that, limited in this way, the particular social group identified might well satisfy the BIA's definition of social group,

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." *Acosta*, 19 I. & N. Dec. at 234. The petitioner's difficulty, however, is that the administrative record does not establish that she is a member of this tightly defined group, for there is no evidence in that record showing that her opposition to the Iranian laws at issue is of the depth and importance required.

In contrast, the respondent has shown that his opposition to the gangs and their way of life is of the depth and importance required: his belief in living "straight" - in obeying the rule of law, in working at an honest job, in not participating in drug-trafficking or the use of violence - was such that he persevered in the way of life he believes to be right even though for his efforts he was tormented, beaten severely, and shot. He knew that it was not necessary to work at a bakery, to reach which he had to daily enter into the territory of his persecutors, in order to earn a living; instead, he could have joined the El Bordo gang, as he was many times enticed to, and "earned" a living by robbing, stealing, and drug-trafficking. He would thus, indeed, have gained the willing protection of the very people he has now turned into his enemies by his heartfelt dedication to following the "house rules" of the juvenile facility. The respondent, even in a foreign country, has amply demonstrated that he believes in the rules of civilization. His belief is

strong enough that he suffered years of torment for it - harassment, beatings, a shooting - and has now incurred the deadly animus of people with the ability to kill him if he returns to Guatemala.

Furthermore, as opposed to his situation concerning the Poporopos gang, there is a reasonable possibility that the respondent would be at risk from the El Bordo gang wherever he might go in Guatemala. See Matter of C-A-L-, supra; Matter of R-, supra. Both the Poporopos gang and the El Bordo gang have national connections, but whereas the Poporopos gang was not sufficiently motivated to persecute the respondent after he left Zacapa, the current nature of the animus of the El Bordo gang members toward the respondent is such that a reasonable person would fear that they would utilize their national connections to attempt to have respondent killed wherever the respondent might go. The situation would be particularly dangerous for the respondent since, as a low-income person, it would be unreasonable to expect him to take effective steps to protect himself from gang members as someone with more means might do, as for instance by hiring security guards. Cf. Abdel-Masih, supra, at 586 n.5 (noting it would be unreasonable to expect respondent to relocate to a certain part of country when that part was largely unpopulated and plagued by banditry and many people in nation were already displaced by civil war).

Therefore, the respondent has established statutory eligibility for asylum on the basis of a well-founded fear of persecution on account of membership in a particular social group. Moreover, in this case, the Court finds that the grounds of political opinion and membership in a particular social group are interchangeable. See Fatin, supra, at 1242. Specifically, the respondent has the political opinion of believing in following the rule of law and earning an honest living and of opposing gang life and its accompanying illegal activities, such as drug-


trafficking and the use of violence. Therefore, the respondent has also established statutory eligibility for asylum on the basis of a well-founded fear of persecution on account of political opinion.

Turning to the issue of discretion, the Court finds that, other than the respondent's illegal entry into the United States, there are no adverse factors in this case. Therefore, the Court finds that a favorable exercise of discretion on respondent's behalf is warranted. Accordingly, the court will grant his application for asylum on the basis of a well-founded fear of persecution on account of political opinion and membership in a particular social group.

In light of the foregoing and after consideration of all the testimonial and documentary evidence of record, the following order will be entered:

ORDER

WHEREFORE IT IS ORDERED that the Respondent's application for asylum pursuant to § 208(a) of the Act is hereby GRANTED and the instant deportation proceedings are hereby TERMINATED. Because the Respondent's asylum application is granted, this Court will not address the issue of Respondent's eligibility for restriction on removal under the more demanding standard of §241(b)(3) of the Act.

  
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BERTHA A. ZUNIGA  
Immigration Judge

Date signed: December 18, 1997