

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
LOS ANGELES, CALIFORNIA



Matter of )  
 )  
 Hector Gonzalo Calderon-Medina )  
 )  
 Respondent. )  
\_\_\_\_\_ )

File Number:  
In Removal ]

Favorable Gay  
Decisions  
↳ based on pol. op

**Charge:** Section 212(a)(6)(A)(i) of the Immigration and Nat  
amended, as an alien present in the United States w  
paroled.

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**Applications:** INA §208 Asylum  
INA §241(b)(3) Withholding of Removal  
Article III of the Convention Against Torture

**On Behalf of Respondent:**  
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**DECISION AND ORDER OF THE IMMIGRATION JUDGE**

**I. PROCEDURAL HISTORY**

The respondent, Hector Gonzalo Calderon-Medina, is a male, native and citizen of Honduras. He entered the United States, at or near Calexico, California, on or about January 2, 2001, without having been inspected by an Immigration and Naturalization Service ("Service") officer. As a result the Service issued to the respondent a Notice to Appear ("NTA") (Form I-862), charging him with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and

Nationality Act ("Act"), for being present in the United States without being admitted or paroled. On January 2, 2001, the Service filed the NTA with the Los Angeles Immigration Court, thereby vesting it with jurisdiction over these proceedings. *See* 8 C.F.R. § 3.14(a)(2001).

Respondent admitted the charges in the NTA and conceded removability. He asked for relief in the forms of asylum, withholding of removal and Article III of the Convention against Torture.

The following documents have been entered into the Court record and marked as evidence. Exhibit 1 is the respondent's NTA; Exhibit 2 is the respondent's I-589 asylum application, along with his declaration and supporting documentation; Exhibit 2(a) is the Notice of Privilege of Counsel and Consequences of Knowingly Filing a Frivolous Application for Asylum; Exhibit 3 is a certified translation of a medical certification and a copy of signature certification with translation.

## II. TESTIMONY

### A. Testimony of Respondent

Respondent is an eighteen year old male, native and citizen of Honduras. He has nine siblings, three brothers and six sisters. For sixteen years he lived in El Progreso, Honduras with his parents.

Respondent left Honduras on December 13, 2000 after receiving threats from a local gang, namely "Mara-18." He arrived in the United States on January 2, 2001. Respondent testified that these threats began in November 2000 when the leader of the gang named Marlon Javier Orellana, approached him and asked him if he wanted to join the gang. Respondent testified that Orellana was a lot older than him and that he was tall and strong. Respondent declined to join, telling the gang leader that he was satisfied as he was. Orellana warned respondent that he would have to

suffer the consequences of his refusal to join the gang. Respondent believed he was approached because Orellana believed he supported the government. Respondent asserted that he refused to join the gang because he did not like the rules the gang lived by, which included killing young people, theft, and rape. Other members of the gang were also sent to try to recruit respondent.

After this incident, respondent went to live at his brother Jose's house located two miles from his parent's home. He remained for a week but returned to his parent's house believing things had calmed down and the gang was not going to bother him anymore. Jose's house was located in the territory of a rival gang, the "Mara Salvatrucha" ("MS"). Respondent believed that because he lived with his brother in rival gang territory, the "Mara-18" gang would not try to find him. Respondent testified that rival gangs were not allowed to cross into each other's territory.

When respondent returned home a week later, Orellana came looking for him again. Respondent hid inside his house and Orellana was unable to find him. Respondent testified that Orellana had approached other boys like him and if they contradicted him he would have them eliminated, i.e. killed. Respondent testified that if he did not join the gang he would also be killed. According to respondent, Orellana had a reputation in the community for being an assassin and that he had killed at least one other neighborhood boy. Apparently, this boy had declined to join the gang and three weeks later he was dead. Respondent stated that he was singled out from the other neighborhood boys because he was the second person out of a group of forty to fifty boys in the neighborhood to decline to join the group. All the other boys in the neighborhood belonged to the gang.

On December 6, 2000, Orellana was waiting for respondent outside of his school. Orellana said nothing but proceeded to punch respondent in the stomach, tear his shirt and steal his money and bicycle. Before he left, Orellana also shot at respondent. Respondent testified

Orellana carried a pistol and that he had seen him armed before this incident. Furthermore, Orellana traveled as part of a group of five persons including himself who were all armed with weapons bigger than pistols that resembled rifles.

Respondent reported this incident to the police who arrested Orellana and later released him on bail. After his release, Orellana found out that respondent had returned home from his brother's house and went looking for him. Respondent hid and Orellana only found respondent's mother. Orellana told respondent's mother to turn him over because he was going to kill her son for supporting the government and opposing the gang. The gang members were unable to find respondent and ceased looking for him around the house. A neighbor told the gang members that he had called the police. Respondent maintains Orellana found out that he opposed "Mara-18" from the official report he filed with the police.

After this incident, respondent returned to his brother's house for a second time and stayed for a week. Once again he was forced to leave after rival gang leaders told him he could not live at his brother's anymore. These rival gangs saw respondent as a spy for the "Mara-18" gang. Respondent testified that if he had refused to leave, he feared that rival gang members would have killed him. At this point, respondent decided to come to the United States.

Three months after the "Mara-18" gang members found out respondent had immigrated, they returned to his mother's house and told her that they would wait until respondent came back. Respondent interpreted this as a death threat, believing that if he were to return the gang would kill him for refusing to join. Since his departure, respondent has spoken to his mother who still lives in Honduras and she believes that the gang members still remember respondent. Furthermore, respondent maintains that he would not be safe anywhere in the country, because anywhere he went he would be asked what neighborhood he was from, why he had no tattoos and whether he

supported a gang or the government. He stated that he would not feel safe living with his married sister in Honduras because where she lives there are gangs as well.

The "Mara-18" gang continues to be active in Honduras, according to respondent. He bases this assessment on information from his mother who has watched news reports indicating that the problem has worsened. Furthermore, the gangs have told respondent's mother that they have not forgotten respondent and will wait until he returns. Respondent believes the police are unable to protect him and he fears he will be mistreated or killed if he returns.

Respondent testified that his friends were not threatened by the gangs because in some way they supported the gang leaders in their neighborhood.

#### Cross-Examination by the Service

Respondent testified that of his nine siblings (3 brothers and 6 sisters) only 2 sisters currently live in Honduras. One of the sisters lives with respondent's mother and the other is married and lives separately in a town one-half hour away. Two other siblings live in Mexico and five live in the United States. The five that live in the United States immigrated over ten years ago. Respondent testified that none of his siblings had ever had a problem with any gang.

Upon further questioning by the Service, respondent admitted that two of his brothers arrived in the United States only five years ago. Jose (the brother respondent had lived with briefly in Honduras), first came to the United States with respondent in order to help respondent immigrate. He is currently residing in Texas. Respondent stated he was too young to remember why his two other brothers immigrated to the United States.

Respondent testified that he is unable to internally relocate in Honduras. He knew he could not stay at his brother Jose's house because the gangs had specifically told his brother that they thought respondent was a spy so he could not stay. Respondent's brother had communicated that

knowledge to respondent before he decided to come to the U.S.

There were six or seven other incidents before September 2000 where respondent had traveled outside his neighborhood and had been approached by gang members demanding to know who he was affiliated with. On one of the occasions, respondent traveled to the banana fields located about two hours away from his residence to visit a female friend. He stayed for two days in a house for visitors. On one of these days, he was standing outside his friend's house when a group of boys came up to him and asked him what neighborhood he was from and what gang he belonged to, "Mara-18" or "MS." Respondent replied that he did not belong to a gang. The gang leader that had approached him then asked him what he was doing in this neighborhood. Respondent replied that he was visiting a friend (who at the time was standing next to him). The gang leader asked the friend if this was true and the friend replied yes. The boys then proceeded to leave respondent alone.

Respondent recounted a second incident where he traveled two and half hours from his hometown after school to finish some homework and get together with friends. A similar confrontation ensued. Some neighborhood boys asked respondent where he was from and to which "mara" (gang) he belonged. Respondent replied that he was in this particular neighborhood to finish some homework and meet some friends. He told the neighborhood boys to confirm his story with the friends he was visiting. As in the previous incident, after the boys did so, they let respondent stay. Since these incidents seemed normal to respondent, he did not include them in his asylum application. He stated that it was normal for visitors to be questioned by gang members and that he knew it had happened to other boys.

Although "Mara-18" gang members sought respondent three months after he left, they have subsequently not attempted to return to his mother's home to find him.

### III. STATEMENT OF THE LAW

The applicant has the burden of proof to establish that he is a refugee as defined in Section 101(a)(42) of the Act. *See* 8 C.F.R. § 208.13. Where the court finds there are significant, meaningful evidentiary gaps, applications will ordinarily be denied for failure of proof. *See id.*; *see also Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989). In determining whether or not the alien has met his burden of proof, the court shall will consider the difficulties faced by asylum applicants in obtaining documentary or other corroborative evidence to advance their claim of persecution. *See Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987). The asylum applicant's testimony may sometimes be the only evidence available, in which case it may suffice if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for the applicant's fear. *See id.*

Section 101(a)(42)(A) of the Act defines the term, "refugee" as follows:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Fear is defined as "a genuine apprehension or awareness of danger in another country."

*Matter of Acosta*, 19 I&N Dec. 211, 218 (BIA 1987) *rev'd on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). A well-founded fear of future persecution must be "objectively reasonable" and "subjectively genuine." *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000). The applicant's testimony is sufficient to satisfy the subjective component. *Id.* In order to meet the objective component, the applicant must show that there is a "reasonable possibility" that he will be persecuted if he were to return to his country of origin. 8 C.F.R. § 208.13(b)(2)(2002). To prove an "objectively reasonable" fear, the applicant must introduce "credible, direct, and specific evidence in the record...with either documentary evidence or

credible testimony." *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999).

Objective fear may be established in two separate ways. The respondent may show that he has been subjected to past persecution, which establishes a presumption that a well-founded fear of future persecution exists. *See Duarte De Guinac v. INS, supra, citing 8 C.F.R. §208.13(b)(1)(i)*. Alternatively, the respondent may show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. *See Duarte De Guinac, supra*. In proving a well-founded fear of future persecution, the applicant can present specific documentary evidence or credible and persuasive testimony. *See id.* (citing to *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995)).

Documentary evidence presented by the asylum applicant establishing past persecution or threat of future persecution is usually sufficient to satisfy the objective component of the well-founded fear standard. *See Aguilera-Cota v. INS*, 914 F.2d 1375, 1379-1380 (9th Cir. 1990). Corroborating evidence for the applicant's persecution claim is not necessary if the applicant's own testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear of persecution. *See Matter of B-*, 21 I&N Dec. 66, 71 (BIA 1995). Available general background information about a country must be included in the record as a foundation for the applicant's claim. *See Matter of S-M-J-*, 20 I&N Dec. 722, 724 (BIA 1997). Additionally, when the record contains country conditions, but the respondent's claim relies upon personal experiences not subject to verification, corroborating documentary evidence of the respondent's experience is not required. *See id.* at 725.

A respondent that has successfully established a well-founded fear of persecution will not automatically be granted asylum. *See Matter of Mogharrabi, supra* at 439. He must show that the feared persecution would be on account of race, religion, nationality, membership in a particular



social group, or political opinion. *See id.*

Since asylum is a form of discretionary relief, an applicant must establish that a favorable exercise of discretion is merited in his case. The respondent sustains this burden by presenting evidence of relevant factors which he believes would support his asylum application. *See Matter of Pula*, 19 I&N Dec. 267, 474 (BIA 1987). The likelihood of present or future persecution is relevant to the exercise of discretion where the respondent successfully established past persecution on account of one of the five reasons enumerated in section 101(a)(42)(A) of the Act. *See Matter of Chen*, 20 I&N Dec. 16, 18 (BIA 1989). In some situations, asylum may be granted where there is little threat of future persecution or when warranted for humanitarian reasons. *See id.* at 19.

#### IV. ANALYSIS

##### A. FINDING OF CREDIBILITY

In order to be granted asylum as a matter of discretion, the court must first make a finding that the applicant is credible. *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998). The burden of proof is on the applicant to establish his credibility. *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *see also* 8 C.F.R. §208.13(a). An applicant's testimony is sufficient to establish the facts testified to without further corroboration if it is credible, persuasive and specific. *Ladha v. INS*, 215 F.3d 889, 900 (9th Cir. 2000). The court cannot reject the applicant's testimony as not credible solely because it is self-serving. *Matter of Acosta, supra* at 218. Nevertheless, failure to bring forward readily available, highly probative and non-duplicative evidence can constitute substantial evidence supporting an adverse credibility finding. *Sidhu v. INS*, 220 F.3d 1085, 1091 (9th Cir. 2000). A finding of adverse credibility must be based upon "specific cogent reasons which are substantial and bear a legitimate nexus to the finding." *Lopez-Reyes v. INS*, 79 F.3d

908, 911 (9th Cir. 1996). A court's finding on credibility is given great deference. *See Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998).

The court finds respondent's testimony in the present case to be detailed and consistent with his asylum application, and the corroborating evidence submitted in the record. During cross-examination conducted by the Service, at no time was the credibility of the respondent successfully challenged. The respondent's testimony given during both direct and cross-examination was mostly consistent with his written statements contained in the application for asylum. The respondent was simply asked to provide additional information to supplement the evidence provided in his testimony and asylum application. The court notes that there were some minor discrepancies between respondent's affidavit and his testimony at the hearing. Nevertheless, the Ninth Circuit has held that minor inconsistencies in the record are not an adequate basis for an adverse credibility finding. *See Vilorio-Lopez v. INS*, 853 F.2d 1137, 1142 (9th Cir. 1988). Therefore, the court finds the respondent to be a credible witness to all material elements of his testimony and asylum claim.

#### B. ELIGIBILITY FOR ASYLUM

In order to be considered eligible for asylum under section 208(a) of the Act, the respondent must demonstrate that he qualifies as a refugee either because he has suffered past persecution or because he has a well-founded fear of future persecution. *See* 8 C.F.R. § 208.13(b), *see also Matter of Chen*, 20 I&N Dec. 16, 18 (BIA 1989). The persecution does not need to be carried out by the government, only by a group the government is unable or unwilling to control. *Mgoim v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999); *Gomez-Saballos v. INS*, 79 F.3d 912 (9th Cir. 1996) (holding that death threats by a former prisoner against his jailer enough to constitute persecution under the Act); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (holding

that threats and actions by ethnic Fijians against Indo-Fijians and the failure of authorities to protect applicant constitute persecution under the Act); *Mendoza-Perez v. U.S. INS*, 902 F.2d 760 (9th Cir. 1990) (threats by death squad constitute persecution by a group the government is unable or unwilling to control).

Finally, an applicant must provide evidence that there is a reasonable possibility he would be singled out for persecution unless he can: (1) show a pattern or practice in the country of origin of persecution of similarly situated individuals and (2) he establishes his own inclusion in the persecuted group. *See* 8 C.F.R. § 208.13(b)(2)(iii). For the following reasons, the court finds that respondent has established eligibility for asylum by demonstrating that he has a well-founded fear of future persecution in Honduras based on his political opinion.

#### 1. WELL-FOUNDED FEAR

A respondent's well-founded fear of persecution must be both subjectively genuine and objectively reasonable to qualify for asylum. *See Mgoin v. INS, supra*. The court does not doubt that the respondent has a genuine fear of future persecution by the "Mara-18" gang if he were to return to Honduras. The respondent has presented the court with credible, consistent, and articulate accounts of events which have substantially supported a genuine fear of future persecution should he return to Honduras. Therefore, the court in the instant matter finds the respondent has satisfied the "subjective component" of the well-founded fear standard by demonstrating a genuine fear of returning to Honduras.

The court must now turn to the issue of determining whether the respondent has presented credible, direct, and specific evidence which would support a finding that he has a reasonable fear of persecution, thus fulfilling the "objective component" of the well-founded fear standard. *See Rodriguez-Rivera v. INS*, 848 F.2d 998 (9th Cir. 1988), *see also Korablina v. INS*, 158 F.3d

1058, 1044 (9th Cir. 1998).

The respondent testified that he feared returning to Honduras because of a well-founded fear of future persecution based upon his political opinion. He stated that he was approached by a local gang and subsequently threatened with death for his refusal to join the gang. He also testified that the gang leader who approached him thought that respondent supported the government. He decided to go to his brother's house to see if the gang would forget about him. A few weeks after respondent refused to join the gang, he was attacked by the gang and shot. He was forced to flee to his brother's house a second time, but had to return home after a rival gang threatened him because they thought he was a spy. Furthermore, respondent stated that gang members returned to his house after finding out he had immigrated and told his mother that they would wait for him to return.

Respondent also provided evidence that the "maras" or gangs that he feared were a group that the government was unable or unwilling to control. The 2000 State Department Country Report on Human Practices for Honduras states that "[t]he Government was unable to prevent the abuse of street children." See Exhibit 2. The Washington Post estimates that there are 475 gangs in Honduras with 32,000 members in total. See Exhibit 2(c). In El Progreso, respondent's hometown, there are 3,000 gang members in a city of 150,000 according to a Canadian newspaper. *Id.* at 2(h). Covenant House, a New York based shelter for runaway children reports that of 221 deaths in the year 2000, seven percent of the deaths were caused by the police and thirteen percent caused by the gangs. *Id.* at 2(d). Sixty percent of the deaths are unexplained. *Id.*

In addition, respondent's testimony provided sufficient proof of a pattern or practice of persecution of a group of similarly situated individuals on account of their political opinion as required under 8 C.F.R. § 208.13(b)(2)(iii). Respondent testified that the "Mara-18" gang went after any boy in the neighborhood who refused to join their group. He testified that he knew of

another boy who like himself had refused to join the gang and three weeks later was found dead. Furthermore, the respondent established his own inclusion in this group by stating that he too refused to join the gang and thus feared the consequences.

Although the lack of corroborating evidence of respondent's claim will not be fatal to the application, the respondent has the choice of introducing evidence to strengthen his claim. *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989). Respondent has introduced several articles on the situation of street children and gangs in Honduras. *See* Exhibit 2. These reports detail the extent of the gang problem in Honduras the government's harsh crackdown on gang members and suspected gang members. *See id.*

## 2. "ON ACCOUNT OF"

### a. POLITICAL OPINION

The respondent in the instant matter is eligible for asylum based on his well-founded fear of persecution on account of political opinion.

The Ninth Circuit Court of Appeals has articulated a four part test for political opinion. An individual seeking asylum on account of political opinion must prove: (1) he has been a victim of persecution; (2) he holds a political opinion; (3) his political opinion is known to or imputed by the persecutors; (4) his ensuing persecution has been or will be on account of this political opinion. *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 507 (9th Cir. 1998) (Wiggins, C. J., concurring). An applicant claiming a well-founded fear of persecution must fulfill parts two, three and four of the test. *Sebastian, supra.*

In addition, it is not necessary that the applicant establish that he was persecuted solely based upon his political opinion. If the applicant is found credible and he testified that he was persecuted on account of his political opinion, then the applicant has met his burden even if there

is a non-political explanation for the persecution. *Gonzales-Neyra v. INS*, 122 F.3d 1293 (9th Cir. 1997).

An applicant can also meet his burden by establishing "political neutrality in an environment in which political neutrality is fraught with hazard." *Sangha, supra* at 1488. According to the Ninth Circuit, political neutrality can be a political opinion under section 101(a)(42)(A) of the Act. *Id.* Neutrality is not the absence of an opinion but rather a "conscious and deliberate choice" by the applicant. *Id.* The applicant must prove that "this opinion was articulated sufficiently for it to be the basis of his past or anticipated persecution." *Id.* Refusing to join a guerilla or illegal government force can be a neutral political opinion if the refusal is in spite of threats by the group. *Id.* The mere refusal to join a non-governmental group such as a guerilla is sufficient to establish a political opinion for purposes of the Act. *See Alonzo v. INS*, 915 F.2d 546 (9th Cir. 1990).

Respondent meets all four prongs of the Ninth Circuit's test for political opinion articulated in *Sangha and Sebastian-Sebastian, supra*. First, respondent has been a victim a persecution. He testified that upon his repeated refusals to join the gang he was attacked, beaten and shot at. Also, he received death threats, including after he escaped from Honduras. Second, respondent unambiguously stated he held a political opinion, in this case "neutrality in an environment in which political neutrality is fraught with hazard." *Sangha, supra*. By refusing to join the gang, respondent knowingly placed his life in danger. He testified that he was aware that the one other boy who had refused to join the gang had been murdered, presumably by the gang. Also, respondent testified that his persecutor (the leader of the gang) had a reputation in the community for being an assassin. Third, the gang was aware of respondent's opinion. Upon being asked to join, respondent expressly declined to do so telling the gang leader that he was happy as

he was. Additionally, respondent's refusal led the gang to impute to him a belief that he supported the government. Finally, respondent believes his opinion will lead to his persecution. Respondent was warned to join the gang or suffer the consequences. Even after he had escaped, some gang members confronted his mother and told her that they would wait until respondent returned. Respondent has interpreted this as a death threat.

Therefore, the court finds because the respondent has successfully established his inclusion and identification by gang members as one who did not wish to join, the respondent has a well-founded fear of future persecution should he return to Honduras on account of his political opinion as a non-gang member.

### 3. DISCRETION

The respondent bears the burden of proof in establishing that a grant of favorable discretion is warranted. *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987). The Board in *Pula*, stated that, "[i]n the absence of any adverse factors, however, asylum should be granted in the exercise of discretion." *Id.* The respondent has no adverse factors which would automatically disqualify him from a grant of asylum, nor is he inadmissible under section 212 of the Act. The court may also exercise favorable discretion for humanitarian reasons even if there is little likelihood of future persecution based upon his prior mistreatment. The respondent has presented both testimony and evidence to establish that he has a well-founded fear of persecution should he be removed to Honduras, on account of his political opinion. Based on the foregoing, the court finds that the respondent has a well-founded fear of future persecution of returning to Honduras. Accordingly, the court will grant his application for asylum in the exercise of discretion. Since the respondent has established a claim for asylum under the Act, consideration of his applications for withholding of removal and Article III of the Convention Against Torture are now moot.

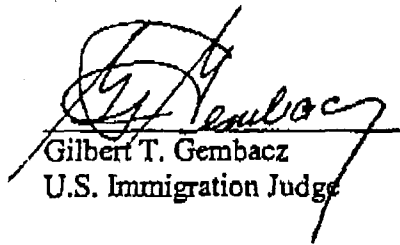
Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's request for asylum, pursuant to INA § 208, be GRANTED

Date:

MAY 1 - 2002

  
Gilbert T. Gembacz  
U.S. Immigration Judge