

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

IN THE MATTER OF:

[REDACTED]
[REDACTED]

RESPONDENT.

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CASE NO. A [REDACTED]

IN REMOVAL PROCEEDINGS AT NEWARK, NEW JERSEY

CHARGE: Sections 212(c)(6)(A)(i) -- inadmissible -- present without lawful admission or parole.

APPLICATIONS: Section 208 -- Asylum; Section 241(b)(3)(A) -- Withholding of Removal to El Salvador; Article 3, United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment -
- Withholding of Removal to El Salvador.

ON BEHALF OF RESPONDENT

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DECISION OF THE IMMIGRATION JUDGE

Respondent is a 16 year-old female native and citizen of El Salvador. She has been afforded *pro bono* representation throughout these proceeding, and the court thanks the two law schools that have afforded her such representation by industrious law students who appeared before this court.

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Inadmissibility

Respondent's inadmissibility is not at issue; in a hearing held on November 2, 2006, she admitted the truth of all factual allegations contained in Exhibit 1, the Notice to Appear, and conceded her inadmissibility as charged, and the court sustained the charge. Respondent declined to designate a country of removal, so this court designated El Salvador, her country of citizenship, if removal might be required.

Relief Sought

Respondent filed Form I-589 [Exhibit 2] on June 29, 2007 (Exhibit 3) when her father signed the application on her behalf, but he never again appeared as a witness in this case. All record and data base checks are complete. Her first version of the I-589 was admitted as Exhibit 2, a letter from the court forwarding it to the Department of State as Exhibit 2A, and the Nebraska receipt as Exhibit 2B, and a supplemental statement by the Respondent was admitted into the Record of Proceeding as Exhibit 7.

Respondent's application Form I-589 represents a timely application for asylum under Section 208 of the Immigration and Nationality Act [the Act]. In addition, the application constitutes an application for withholding of removal (called restriction of removal in the Act) under Section 241(b)(3)(A) of the Act and also under Section 3 of the United Nations Convention Against Torture.

Although the court has jurisdiction to review it, Respondent does not seek review of her denied application for Temporary Protected Status (Exhibit 3) under Section 244 of the Immigration and Nationality Act. The matter was resolved on the record on April 9, 2008.

Burden of Proof

Respondent contends that she is eligible for asylum and for withholding of removal because she fears future persecution in El Salvador by gang members in her city. She does not contend that she was subjected to persecution in the past, although she has testified that she has received threatening looks or stares from gang members that contribute to her future fear.

Respondent fears future persecution in El Salvador by members of a local gang and she bases her claim to relief on a number of various claims, but this court will begin with, and conclude with, her contention that her fear is religion-based. She fears that, because she is an Evangelical Christian, she will be persecuted on account of her religion because gang members are opposed to the religion's principles that preach a duty to engage in lawful conduct.

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Because Respondent filed her application after the effective date of the Real ID Act of 2005, her application is considered after amendment to the Immigration and Nationality Act.

To be eligible for asylum under Section 208 of the Immigration and Nationality Act [the Act], a Respondent must meet the definition of "refugee," which requires proof of past persecution or, in the alternative, a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* Sections 101(a)(42)(a) and 208 of the Act. *See also* Matter of Chen, 20 I&N Dec.16 (BIA 1989).

To prove "persecution" an asylum applicant must prove that his or her "life or freedom would be threatened" on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987); Lin v. INS, 238 F.3d 239, 243 (3d Cir. 2001); Chang v. INS, 119 F.3d 1055, 1059 (3d Cir. 1997). "Persecution" has been defined as including "threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom." Lukwago v. Ashcroft, 329 F.3d 157, 168 (3d Cir. 2003). An asylum applicant establishes a well-founded fear of future persecution if he or she shows that a reasonable person in the same circumstances would fear persecution on the basis of one of those five grounds. Abdulrahman v. Ashcroft, 330 F.3d 587, 592 (3d Cir. 2003); Guevara-Flores v. INS, 786 F.2d 1242 (5th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). As the Court of Appeals for the Third Circuit has observed, the subjective fear of persecution must be "supported by objective evidence that persecution is a reasonable possibility." Lin, *supra* at 244.

As to past persecution, as the court will discuss *infra*, Respondent has been able to avoid it. He has been made aware of threats against him, but none have been made directly and none have come to fruition. Past persecution can be the basis of a grant of asylum or withholding of removal. 8 C.F.R. §1208.13(b)(1); *See also* Singh v. Gonzalez, 406 F.3d 191 (3d Cir. 2005); Shardar v. Ashcroft, 382 F.3d 318 (3d Cir. 2004); Berishaj v. Ashcroft, 378 F.3d 314 (3d Cir. 2004); Lukwago v. Ashcroft, *supra*; Matter of N-M-A-, 22 I&N Dec. 312 (BIA 1998).

Respondent must prove the facts underlying the claims for relief by a preponderance of credible, probative evidence. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), *modified on other grounds*, Matter of Mogharrabi, *supra*; Matter of Exilus, 18 I&N Dec. 276 (BIA 1962); 8 C.F.R. §§1208.13(a), 1208.16(b). Respondent must also establish that the facts proven satisfy the statutory standards of eligibility for these forms of relief. *Id.* Sections 208 and 241(b)(3) of the Act have been amended by the Real ID Act of 2005 to more clearly define Respondent's burden of proof and this court's evidentiary considerations and the court has applied the amendments to consideration of Respondent's case.

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The burden of proof required to establish eligibility for asylum is less than that required for restriction on removal (previously and often still called withholding of deportation in the Act, still called withholding of removal in the federal regulations). Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003). To be eligible for mandatory withholding or restriction on removal under Section 241(b)(3)(A) of the Act, a Respondent must show that his or her life or freedom would be threatened on account of one of the enumerated grounds. INS v. Stevic, 467 U.S. 407 (1984). It is a "clear probability" standard requiring a showing by a Respondent that it is "more likely than not" that he or she would be subject to persecution. Id. See also Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001); Chang v. INS, 119 F.3d 1055, 1066 (3d Cir. 1997). Failure to meet the burden of proof under Section 208 asylum mandates denial of the application for mandatory withholding of removal. Zubeda v. Ashcroft, *supra*. If a Respondent establishes eligibility for this relief, the relief is mandatory unless Respondent is barred by an exclusory provision in the Act. Once granted mandatory restriction on removal, an alien cannot be returned to the country of persecution, but can, however, be sent to another country under certain circumstances. In contrast, asylum may be denied in the exercise of discretion even to aliens who establish statutory eligibility for the relief and asylum eventually could lead to adjustment of status to that of lawful permanent resident of this country.

Respondent's other application for protection is pursuant to Article 3, United Nations Convention Against Torture. Respondent must prove that it is more likely than not that a public official or one working with acquiescence of a public official will torture Respondent for some reason if she is removed to El Salvador. Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005); Zubeda v. Ashcroft, *supra*; Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002); Matter of J-E-, 23 I&N Dec. 291 (BIA 2002); Matters of Y-L-, A-G-, and R-S-R-, 23 I&N Dec. 270 (Att'y Gen. 2002).

Delay

[REDACTED]

Evidence Presented

Respondent testified in support of her applications for relief on April 9 and 21, 2008. On

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April 21, 2008, she also called one of her expert witnesses, Harry E. Vanden, Ph.D. She also relies on documentary evidence. Exhibit 5 contains statements from Respondent's aunts in El Salvador with whom she lived at various times and from expert witnesses in this case. The Exhibit also contains evidence of Respondent's identity, but her identity is not at issue in this case.

Exhibits 6 and 6B are the many submissions about country conditions in El Salvador, much of which is focused on the history of gangs in El Salvador.

Exhibit 7 is comprised of not only Respondent's supplemental statement but also a supplemental statement from Respondent's Pastor in El Salvador.

Factual Basis of the Relief Claims

Respondent testified and explained that she has fled her country in fear that results from her religious activities in her small town of [REDACTED] in the Department of [REDACTED]. She has been deeply involved in her church, the [REDACTED] and also involved in its youth group, which evangelizes to youngsters. The group is called [REDACTED]. As part of her religious work, Respondent preaches to other youngsters the importance not only of religion, but also the importance of living a clean and law-abiding life. Her testimony is that the members of the gang that thrives locally see the Respondent coming and going out of church and then returning home, because they congregate in front of a cantina near the Respondent's Aunt's home where she lives.

Respondent knows that the gang members oppose her religion. She has seen [REDACTED] a member of the church, being attacked and raped by gang members. Respondent's aunt also wrote of the crime (Exhibit 5, Tab D) although her aunt's letter is not clear about the number of assailants that set upon [REDACTED] in March, 2004. Her Pastor writes that a young man who is a member of their church was abducted by the gang members and held for ransom simply because he had family living in this country (Exhibit 7, letter from [REDACTED]). The Pastor worries that gangs might learn that Respondent also has such relatives in this country.

Respondent explained that there are 7 gang members in two groups, one called [REDACTED] and one called [REDACTED] she believes. They dress in black, wear headbands, carry knives, and verbally harass people walking by where they congregate, which is only a few houses away from where Respondent lived with her aunt.

Only in the last year that Respondent lived in El Salvador did she begin to attend the [REDACTED] which is a small congregation of only about 50 congregants. She

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attends Sunday services and also goes to youth group meetings, with about 24 other young people, on Fridays at 4 p.m

The Respondent's Pastor writes, in his March 11, 2007 letter about Respondent:

I give faith that she was involved in the youth work that the church develops in its program '[REDACTED]' where she collaborated to reach young people with problems of family disintegration, alcoholism, drug addiction and gangs, which are the principal causes of delinquency in our environment.

Exhibit 5, Tab C.


The local gangs members know of Respondent's evangelical activities not only because they can see her go in and out of the church, but also because her aunt, [REDACTED] also is an Evangelical Christian who approached gang members herself to try to convince them to join the church (without success). Respondent and the youth members did not go out to evangelize on their own because it would have been too dangerous to do so.

Harry E. Vanden, Ph.D., both wrote and testified that gangs in El Salvador consider Evangelical Christians to be their opponents because members of:

... church families have attempted to resisted [sic] joining the gangs, have advocated an ideology or set of core values that are markedly different from those of the gang and which contradict the gang belief system. These people are targeted by the gangs to stop them from challenging gang authority and control. They are also targeted to serve as examples so others will not resist the gang's criminal activities, report them to the police, or testify against them.

May 25, 2007 written statement by Dr. Vanden, at ¶17 (Exhibit 5, Tab H).

Police are at least 30 minutes away from [REDACTED], so cannot be available when the gang members commit crimes. In 2006, Respondent and her aunt and her cousins witnessed a rape of a girl by gang members. Respondent and her aunt saw the young girl, also a member of Respondent's church, being dragged away by gang members. Her aunt called police, but they never responded, even where the situation was so desperate. Respondent testified in cross-examination that one of the gang members saw the Respondent looking at the incident and glared at her in a threatening way.


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Respondent testified that she and her little sister left El Salvador with smugglers twice, but the first time they were detected in Guatemala and deported back to El Salvador. Her father was conspicuously absent and did not testify as an eyewitness to the rape that Respondent described. The court speculates that he did not want to be questioned about the smugglers he twice had arranged to bring his daughters to this country at tremendous risk to them.

Credibility

Respondent's written asylum application is lengthy and detailed. It departs from Respondent's letters in support of her claim as her Pastor adds that one young man in the Evangelical Church was kidnaped for ransom not only because of his church activities, but also because he has family in the United States that might pay ransom for his release. Respondent's testimony differs from her aunt's letter opinion that a young woman abducted by gang members was abducted not because of religion but because the girl was mentally disabled and more vulnerable to attack because she was less able to protect herself. Respondent's father failed to come to court to testify as an eyewitness to an abduction by gang members involving another young church member. These conflicts represent a threat to Respondent's credibility that she has not resolved.

But the court finds that Respondent is credible because Respondent's testimony is not only consistent with her application and with the country conditions in El Salvador according to Dr. Vanden, but also consistent with general evidence about gangs in El Salvador and their opposition to the Evangelical Christian movement.

Respondent's religious commitment and desire to evangelize is clear from her very convincing testimony that she deeply loves her religion and considers it to be her path in life.

The fact that Respondent used a smuggler twice to gain admission to this country, at the obvious peril to her little sister, does not collapse his credibility. She admits that she endangered her sister, but it is equally clear that it was Respondent's desire to reunite her family instead of leaving her little sister behind in El Salvador.

Legal Analysis

A finding of credibility does not mandate that asylum should be granted. Matter of E-P-, 22 I&N Dec. 860 (BIA 1997). Respondent must still establish his eligibility for relief.

Respondent has established that her feared persecutors, the MS gang members in Nuevo Concepcion, belong to an organization that the government of El Salvador is unable to control.

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The government is willing and has attempted to engage in anti-gang actions including incarcerating gang members as much as possible, and punishing them with a heavy hand (*Mano Duro*). At Exhibit 5, Tab I, Respondent also presents an expert's opinion and conclusion that the government of El Salvador is unable to control the gangs in the country. There is still no success and the gangs imported into El Salvador from this and nearby countries continue to grow, at a number greater than 30,000 at this time. At most, police can write up a report or complaint, but they are ineffective. In fact, in Respondent's community, the police are largely absent because they are 30 minutes away and do not respond even when advised that a serious crime by a gang member is in progress. Thus, Respondent meets the requisite of *Matter of Acosta, supra*, that she so identify her feared persecutor.

Respondent has testified credibly, particularly given her age and the past terrifying adventure that she had as she was smuggled, deliberately and dangerously, out of El Salvador. It is obvious that Respondent had mixed motives for coming to this country; she cried when she testified that she loves her father and wanted to be with him. She is clearly in fear of general conditions in [REDACTED], which she admits poses dangers for her even if she were never involved in her present Evangelical church. She also admits, through her testimony, that her gender is at issue because members of gangs have involved themselves in sexual assaults against women. Along those lines, this court remains convinced that the article from the *New York Times* supplied post-hearing by Respondent (now admitted as Exhibit 8) does support the expert's testimony about gang violence against women because the article, although written about willing female recruits, details the mistreatment of women by other gang members, clearly a potential situation that could transpire with regard to Respondent, regardless of her willingness to be involved in gangs. But all of the other motives that the gang members might have for harming the Respondent, though undeniable, pale against the obvious motive that they oppose her religion, her Evangelical principles and her public display of her loyalty to her religion through her Church attendance and membership in her Church youth group. Thus, members of the local gang perceive Respondent as their enemy. Respondent's testimony about her fears that the gang members might persecute her because of her Evangelical religion, save and except for few factual variances from supporting letters that she has filed, is not rebutted by the Department of Homeland Security.

Gang members in [REDACTED] have kidnaped other young members of the Respondent's church who also belong to her youth group. Respondent's testimony is that she fears that the gangs see the members of the Evangelical Church as their opponents because their activities conflict with the purpose of the gangs: crime, violence, extortion, and other lawless acts. Given Respondent's female gender, she fears that she would not only be kidnaped, but also raped, which enhances her fears on a reasonable basis, given the violent treatment of women, even those willing to join gangs (Exhibit 8) by gangs. Her having seen two sexual assaults

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against women provide Respondent with an objective basis for her subjective fear of future persecution at the hands of the gang members in her community. Certainly, Exhibit 6, Tab Y references a murder of religious workers, likely by a gang. It was a Pastor of a Lutheran church who was a political activist who was murdered in November, 2007. Exhibit 6, Tab Z details the murder of an Evangelical Pastor in 2006, known for his religious work, and likely murdered by gangs who opposed his work. On April 1, 2007, it was reported that a Catholic Priest who preached against crime and violence was murdered by gang members who opposed him (Exhibit 6, Tab BB). The Department of Homeland Security presents no challenge to Respondent's testimony that she fears persecution by gangs on account of her religion.

Based on her testimony and evidence, Respondent convinces this court that she has a reasonable and well-founded fear of future persecution against her by gangs on account of her Evangelical Christianity.

Respondent is far too young, in the opinion of the undersigned, to be expected to relocate in El Salvador, even if her father might fund her room and board at a private school away from [REDACTED]. She has not lived on her own before. She has no employment skills and no academic accomplishment to equip her to live elsewhere on her own. Hearing the Respondent describe her trip in containers to come to this country amplifies the desperation that Respondent felt about leaving her nation. Both of Respondent's parents live in this country; only her aunts have afforded her with shelter. It is accurate, and Respondent concedes this also, that one of Respondent's uncles was recently deported to El Salvador, providing perhaps a safer home for the Respondent, but Respondent's fear is of what might happen to her when she might be found alone going to or from her church activities, a likely experience given that her aunts have not been able to provide full-time escort services for the Respondent. The court has heard no evidence of a reasonable expectation that the Respondent might relocate in El Salvador.

The court concludes that the Respondent has established her eligibility for relief under Section 208 of the Immigration and Nationality Act.

Although Respondent has made other applications for relief, the court will not decide them at this time, as Respondent's application for asylum provides her with a pathway to lawful permanent residence in this country, which her withholding applications do not.

ORDER

IT IS ORDERED that Respondent's application for asylum is GRANTED.

IT IS FURTHER ORDERED that Respondent comply with all post-order clearances that



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might be required of her by the Department of Homeland Security, described in the attachment to this decision, and that, subject to Respondent's full compliance, the Department of Homeland Security provide Respondent with necessary documentation to effectuate the decision of this court.

SIGNED May 13, 2008 at Newark, New Jersey.

ANNIE S. GARCY, Immigration Judge